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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. 747

HENRY A. WALLACE, SECRETARY OF AGRICULTURE, AND HENRY A. WALLACE, SECRETARY OF AGRICULTURE, HOMER CUMMINGS, ATTORNEY GENERAL, AND DANIEL C. ROPER, SECRETARY OF COMMERCE, SITTING AS A COMMISSION UNDER THE GRAIN FUTURES ACT,

Petitioners,

vs.

ARTHUR W. CUTTEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

FRANCIS X. BUSCH,
ORVILLE J. TAYLOR,
JAMES J. MAGNER,
Counsel for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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BRIEF FOR THE RESPONDENT.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 479) is reported in 80 Fed. (2d) 140.

JURISDICTION.

The judgment of the Circuit Court of Appeals, reversing the order of the Grain Futures Commission, was entered November 25, 1935 (R. 483-484).

Petition for certiorari was filed February 6, 1936, and was granted on March 9, 1936 (R. 485).

The jurisdiction of this Court rests on Section 6 (b) of the Grain Futures Act, c. 369, 42 Stat. 1001 (U. S. C., Tit. 7, sec. 10) and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., Tit. 28, sec. 347).

QUESTIONS PRESENTED.

Petitioners' paraphrase of Section 6 (b) under this heading (Pet. Br. p. 2) is incorrect. It is not for the violation of "any regulation" (which would include the mere failure to file reports, or the filing of inaccurate reports), separate and apart from an attempt to manipulate the market price of grain, or other violation of the act, that proceedings may be instituted by the Secretary of Agriculture under Section 6 (b). *Current attempts* (presumably national in effect) *by individuals, seeking to manipulate the market price of grain are the activities contemplated to be circumvented by the processes of the section.* Under the provisions of Section 5 (b), and as a condition to the designation of the contract market the governing board of the market is required to provide for the filing of reports, either by the board or by any member thereof, as the Secretary may direct. Responsibility, for the filing of reports, in such form and at such time or times, as is required by the Secretary of Agriculture, was thus

centralized and devolved upon the contract market, and made a condition of its continued existence as such.

The statement (Pet. Br. p. 3) that the Commission "made findings sustaining the charges in the complaint" is not correct. The complaint (R. 11) charged (1) that during 1930 and 1931 there existed a criminal conspiracy between the respondent and others, to conceal his trading and position in the market from the Grain Future Administration, and (2) that respondent attempted to manipulate the market price of grain, and in furtherance of such attempt concealed his transactions by failing to file reports and by filing false reports. The Commission *did not* find that any such conspiracy existed. Neither the fourteen findings of fact made by the Commission, nor the discussion of the evidence which precedes them (R. 451-465), made any specific finding that the failure to report, or the alleged inaccurate reports, was the result of a conspiracy. The first charge stated in paragraph 1 of the complaint may, therefore, be disregarded for the purposes of this review.

The commission did find (R. 464) that the respondent attempted, during 1930 and 1931, to manipulate the market price of grain. It based this finding of ultimate fact, (which was and is necessary to the Commission's order, in order to bring the proceeding within the scope of Section 6 (b)), primarily upon the findings that the respondent filed no reports during 1930, and filed allegedly false reports during 1931.

An attempt is made at various portions of the petitioners' brief (Pet. Br. p. 41) to justify the Commission's order on the ground that the respondent *could* be barred from trading in contract markets for the failure to file reports, and for the filing of inaccurate reports—dissociated from any attempt to manipulate. The respondent disputes the

validity of such position. The provisions of Section 6 (b), were intended only to circumscribe and purge presently operative practices seeking to manipulate the market price of grain. The legislation did not contemplate that individuals were to be ordered barred from trading in contract markets for the mere failure to file reports or for filing false reports. The sponsors of the legislation regarded any suggestions which would require the Secretary to pursue the individual, as a dilution of the Secretary's power over the contract market.

STATUTE INVOLVED.

The complete Grain Futures Act is set forth in an appendix to Petitioners' Brief, pages 139 to 149.

STATEMENT OF THE CASE.

In order to invoke the extraordinary power of the Grain Futures Commission, created under Section 6 (a) of the Grain Futures Act, it is required by Section 6 (b) of the same act, that the Secretary of Agriculture shall entertain the belief that some person *is violating* the act, or *is attempting* to manipulate the market price of grain in violation of Section 5 thereof or the rules and regulations made pursuant to its requirements.

The complaint (R. 10-25) in this case, filed April 9, 1934, charged that during the years *1930* and *1931*, the respondent *had* attempted to manipulate the market price of grain, and that in furtherance of said attempt he *had*, in conspiracy with others, failed and refused to file reports, filed false reports and caused "his account" (R. 11, Par. 3) to be "split" and divided.

It was neither alleged, nor proved that the respondent

was, at the time of the proceeding, either violating the Grain Futures Act or then engaged in an attempt to manipulate the market price of grain. It further appeared that the reporting requirements were suspended by the Secretary of Agriculture on October 24, 1932, and remained so suspended until July 20, 1933 (R. 178).

The questions of law, appropriately preserved throughout the proceeding before the Commission, by motions to quash and to dismiss, (R. 461) require the judicial ascertainment of the meaning, scope and purpose of Section 6 (b) and the extent of the power of the Secretary of Agriculture and of the Commission thereunder.

Respondent contends: That the act contemplates (and considered as a constitutional enactment could only contemplate) the initiation of proceedings seeking only to purge the market of *presently* pending manipulative practices *as such*, and that the construction of the unambiguous language of the section arrived at in the opinion of the Circuit Court of Appeals, should be sustained.

Petitioners, in effect, contend: That the section was intended by the Congress to authorize the Secretary of Agriculture to bring about the institution of punitive proceedings which seek an order barring accused individuals from the right to trade in the contract markets, for any period of time to be fixed solely by the Commission, and for *past* violations having no relationship to any present administrative necessities; that it was intended by the Congress, to confer such power *as well as* the power to institute proceedings seeking to purge a present practice from the markets; that if the plain, unambiguous language means anything less, then the responsibility rests with the courts to extend the statute by construction in order to prevent the power of the Secretary of Agriculture in the regulation of the contract markets from being reduced to a "nullity."

The foregoing represents the primary issue precipitated by this proceeding.

A collateral question, introduced by petitioners for the first time in the Circuit Court of Appeals and also insisted upon here, is involved in petitioners' contention that the respondent *could* also be barred for the mere failure to file reports during 1930, or for having filed inaccurate reports during 1931—*separate and apart from any attempt to manipulate the market price of grain.* This subsidiary question is precipitated by the petitioners' assertion that even if the charge of attempted manipulation, *upon which the Commission's order was based,* were to be regarded as not supported by the weight of the evidence, nevertheless, under the statute, the order *could* be based upon those findings of evidentiary fact from which rose the *ultimate conclusion* motivating both the complaint and the order. Respondent does not agree with the contention, for, it is submitted, the Commission did not enter an order based on that theory. This should in itself be a complete answer. Furthermore petitioners' contention is not in accordance with the intent of the Act, for, under Section 5 (b) thereof, in order to avoid a decentralization of responsibility, it was made a condition precedent and subsequent to the continued licensed existence of the contract market that the governing board thereof provide for the making and filing of reports, either by the board or by the members, as determined by the Secretary of Agriculture, and in such form as the Secretary of Agriculture shall direct.

Assuming, but not conceding, the jurisdiction and power asserted, and constitutional legislation conferring and preserving both the asserted jurisdiction and the power, then the factual question presented is the propriety of the Commission's conclusion that: the respondent attempted to manipulate the market price of grain during the years 1930 and 1931.

The foregoing conclusion (R. 464-465), which is the conclusion of ultimate fact relied upon to support the order, (petitioners' argument (Br. 41) to the contrary notwithstanding) is grounded on two findings of evidentiary fact, namely, that respondent filed no reports during 1930, and filed allegedly false reports during 1931. On this point (R. 464) the Commission said that respondent's trading during the two years was not "purposeless" and that "the evidence as a whole leads the Commission inescapably to the conclusion that respondent was attempting to manipulate the price of wheat."

While insisting that "there is no serious dispute between the parties as to most of the ultimate facts involved in this proceeding" (Pet. Br. 40) and that this case "comes before this Court upon a practically undisputed fact situation" (Pet. Br. 41), nevertheless petitioners have presented under this heading of their brief an extended discussion of the evidentiary facts, which, while substantially correct within the limits to which the discussion is carried, refrains from a particularization of those circumstances which would aid the respondent. To supply the lack at this point, would be to usurp the function of argument.

It is sufficient to say, that the Chicago office of the Grain Futures Administration was in full possession of all facts concerning Mr. Cutten's trading, his accounts, and the accounts of his relatives, from the year 1927 until 1932, when the reporting requirements were suspended. *It is the undisputed testimony of five* (R. 59, 75, 87, 98, 106) *witnesses that with respect to the particular years singled out by the petitioners, the auditing representatives of the Chicago office of the Grain Futures Administration, examined the books and records of the commission houses during the very same years and were familiar with the exist-*

ence of the accounts. Such representatives did not, during this period, make any complaint with respect to the same.

Omissions in reporting were known to the Chicago supervisor (R. 153, 173) as early as the month of March, 1930, and discussed by him with his superiors. (R. 173.) In view of the fact that there was no evidence of an attempt to manipulate the market, and the fact that the inference of such attempt was drawn by the Commission solely from the known infractions of the reporting requirements, the alleged two year investigation* produced no substantial facts about the accounts not known to auditors for the Grain Futures Administration during 1930 and 1931. The question whether such reports as were filed were correct or incorrect, turns upon the meaning to be given to the reporting regulations; for instance, the interpretation to be given the word "control" as used in the regulations. (R. 437) Many of the accounts involved were those of Mr. Cutten's relatives, and obviously he had no property interest therein. If they were not his, he was not under any duty to report them.

We shall reserve for discussion under Point III of this brief and argument, respondent's amplification of the facts referred to in the petitioners' statement, from which it will appear that the charge that the respondent attempted to manipulate the market during 1930 and 1931, is a conclusion not supported by the evidence.

It may be of some assistance to the court to clarify some of the trade terms used in the briefs and in the record.

Grains traded in on the Chicago Board of Trade, in futures, are wheat, corn, oats, rye, and barley.

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* Respondent contends that the real motive for the assertion that it took two years to determine if he was subject to prosecution under the Grain Futures Act, is to explain the Secretary's failure to act within two years under a section of the Act which only authorizes a proceeding to purge a presently existing practice.

In the case of wheat, the usual months during which deliveries are made are May, July, September and December.

Contracts made earlier than the delivery month, and calling for delivery during such months, are called "futures," *i. e.*, May "future," July "future."

In any delivery month, as for example July, all then outstanding open contracts must be closed *not later than the last business day of that month.* Any member "long" July wheat must sell it out in the "pit," or take delivery of it.

Any member "short" wheat must buy it back in the pit, or actually deliver it.

Members of the Chicago Board of Trade may be put into two general classes: clearing and non-clearing members. Clearing members are those who hold a membership in the Clearing Association, and who have direct contact with the member who is taking the other side of any transaction which is made.

Non-clearing members, in order to have a transaction consummated, may either file their orders through a clearing member, who charges them one-half the rate of commission charged nonmembers, or may themselves execute their own orders and have them cleared by some clearing member. It was the practice of respondent to give his orders to a clearing member, who handled them just as those of any other customer would have been handled.

SUMMARY OF ARGUMENT.

I.

The theory of statutory regulation expressed in the Grain Futures Act contemplates the self-regulation of the licensed contract markets by the governing boards thereof, under governmental supervision. The responsibility for the making and filing of reports, whether by the board or the members, for the prevention of the manipulation of prices and dissemination of false and misleading market information, is made a condition precedent and subsequent to the continued enjoyment by the contract market of its designation as such.

Comparison of the provisions of Section 6 (a) and 6 (b) and Section 9 of the Grain Futures Act, requires the conclusion that Section 6 (b) was intended *only* to provide a method for purging the contract markets of current practices seeking to manipulate the market price of grain. The section was not intended to authorize the institution of purely punitive proceedings long after the practices have ceased.

In each case arising under the statute the essential inquiry is whether or not the evidence received will justify the conclusion that the accused person is attempting to manipulate the market price of grain, and each case presents a new and separate inquiry.

In the case at bar, it was neither alleged, nor proved, that the respondent was attempting to manipulate the market price of grain at the time of the filing of the complaint. The complaint was not initiated, in accordance with either the letter or the intent of the statute.

If Section 6 (b) may be invoked by the Secretary of Ag-

riculture after the passage of three years, it can be invoked after the passage of ten years. To construe the Act as authorizing the Secretary of Agriculture to proceed thereunder at any time selected by him would be contrary to the national policy as expressed in statutes of limitations for far more serious offenses.

Examination of the legislative history of the Future Trading Act (the immediate statutory predecessor of the Grain Futures Act), indicates that the intent and purpose of the legislation was the prevention and frustration of manipulative practices.

Since Congress did not, in Section 9 of the Act, provide for the punishment of either manipulation, as such, or attempts to manipulate, it is improper for petitioners to draw the implication that an administrative agency was authorized to institute punitive proceedings.

The scrutiny, consideration and revision to which Section 6 of the original Future Trading Act was subjected when it reached the Senate Committee on Agriculture and Forestry (which added Section 6 (b)), precludes any conclusion that the differing language employed in the respective sections was the result of "inadvertence." It appears from the context of the respective sections and from the testimony of witnesses before the Committee that the language of each section was advisedly chosen. It is apparent that the Congress recognized that in the one section it was dealing with the licensed contract market, as such, and in the other section, dealing with the rights of individuals.

II.

Petitioners insist upon a construction of Section 6 (b) which would authorize the issuance by the Grain Futures Commission of orders barring accused individuals from

trading privileges in contract markets as the penalty for alleged attempts to manipulate the market price of grain. In this case, the order relates to an alleged attempt during the years 1930 and 1931. The order of the Commission is intended solely as punishment for past transgressions.

To construe the Act as contended for by petitioners would render the section unconstitutional, because:

(1) It would assume an attempt by the Congress to confer upon a legislative agency, the members of which are procured from the executive branch of the government, the purely judicial power to order the infliction of a penalty for the violation of law;

(2) The accused individual would be denied a trial by jury in violation of the Constitution;

(3) There would be a lack of due process in a proceeding designed to impose a penalty, in that one of the members of the administrative tribunal is permitted to occupy the dual capacity of complainant and judge;

(4) There would be a further lack of due process, because, the statute supplies no statutory definition of the terms "manipulate," "manipulation," or "attempt to manipulate."

It is not consistent with our theory of government to permit the fact of guilt and the duration, extent and nature of punishment, to be determined and adjudged by legislative agencies.

Authorities involving the revocation of licenses by administrative agencies are not here applicable, since the Congress of 1922 did not undertake to require licenses from individuals making contracts for the future delivery of grain.

III.

The Commission's conclusion that respondent attempted to manipulate the market price of wheat during 1930 and 1931, which is predicated primarily upon the failure to

comply with reporting requirements of the Secretary of Agriculture during 1930 and 1931, is not supported by the weight of the evidence.

From reports filed by grain commission houses reflecting the respondent's market activity, respondent's failure to file reports during 1930 was known to the Chicago supervisor of the Grain Futures Administration, and discussed by him with his superior officers during that year. It is the testimony of five witnesses that auditors for the Chicago office of the Grain Futures Administration examined the books of the Commission firms during 1930 and 1931, knew of the existence of the accounts involved, and made no suggestions with respect to the method of reporting them.

The evidence shows that the holdings in all accounts, even when treated on a combined basis, were not of such magnitude during 1930 and 1931 as to warrant inference that there was a purposeful concealment of respondent's position in the market, and the activities of the Grain Stabilization Corporation, during these years, were of such magnitude that the market activities of an individual trader could have no effect on the market price of grain.

Analysis of price fluctuations selected by the complaint discloses that respondent's transactions had no effect on the market price of wheat.

ARGUMENT.

I.

SECTION 6 (b) OF THE GRAIN FUTURES ACT WHEN CONSIDERED EITHER APART FROM, OR TOGETHER WITH, THE REMAINDER OF THE ACT CONFERS UPON THE SECRETARY OF AGRICULTURE ONLY THE POWER TO INSTITUTE REMEDIAL PROCEEDINGS DESIGNED TO PURGE THE MARKET OF ANY THEN EXISTING MANIPULATIVE PRACTICES. THE SECTION DOES NOT PURPORT TO CONFER POWER UPON THE SECRETARY OF AGRICULTURE TO INSTITUTE PROCEEDINGS DESIGNED SOLELY TO PUNISH FOR PAST VIOLATIONS HAVING NO RELATION TO EXISTING CONDITIONS.

It is respondent's contention that the Secretary of Agriculture and the Commission have misinterpreted the text and misconceived the purpose of Section 6 (b) of The Grain Futures Act of 1922. In order to provide the basis for a proceeding punitive in character, it is sought to extend, by construction, legislation which was only intended to furnish an administrative process preventive in its objective.

It is further contended that the interpretation of the Act insisted upon by the Secretary and the Commission, is, as applied to the facts of this case, clearly unconstitutional. It would divert the Act to a punitive course. If upheld it would deprive the respondent, and any other accused persons similarly situated, of the right to trial by jury before punishment is inflicted. It would amount to a usurpation of the functions of court and jury by administrative agencies.

The question presented by the interpretation of Section

6 (b) involves more than mere nicety of language. It is important, not alone to this respondent, that the proper construction of Section 6 (b) be ascertained. When properly interpreted, there is thereby disclosed, in respect of the particular legislation here reviewed, a line of demarcation between that which *might* on the one hand be regarded as an appropriate function for an administrative agency, and that which, ostensibly administrative, would be in fact and purpose, an exercise of power and duty reposed in our system of courts and juries.

Respondent will discuss, in order, the legislation, its text, history and purpose, returning thereafter to a discussion of petitioners' criticisms of the decision reached by the Circuit Court of Appeals, asserted by petitioners under points I and II and III of their brief and argument.

The Grain Futures Act, approved September 21, 1922, was the second attempt by the Congress to regulate exchanges and boards of trade whereon trading in "futures" takes place. On August 21, 1921, the 67th Congress, at its first session, enacted an act similar in structure to the present act, but differing in one important aspect. The first act, known as the Future Trading Act, was an attempt to regulate trading in grain futures under the authority of the taxing power. That act was declared unconstitutional by this Court in the case of *Hill* v. *Wallace,* 259 U. S. 44, decided on May 15, 1922. The 67th Congress, being then in its second session, revised the act so as to bring the legislation within the purview of the Commerce Clause, but with that exception the Grain Futures Act retained much of the detail of the Future Trading Act.

The validity of the Grain Futures Act was also challenged, but this Court declared it to be a constitutional enactment in *Board of Trade* v. *Olsen,* 262 U. S. 1.

In the *Olsen* case the complainants attacked the validity

of Section 6 (b), because a jury trial was not afforded, and on that point this Court said, at page 43:

> "Paragraph (b) of § 6 which gives to the Commission the power, on complaint after investigation by the Secretary of Agriculture, and after a hearing, to exclude from all contract markets any person violating any of the provisions of the act or attempting to manipulate the market price of any grain in violation of the provisions of § 5 of the act or of any of the rules or regulations made in pursuance to its requirements, is attacked as invalid because a jury trial is not afforded. The plaintiffs do not aver that they are committing acts which will subject them to such exclusion, or that charges have been made and proceedings have been begun or are about to be begun against them by the Secretary of Agriculture. Until they are thus in danger of suffering prejudice from the operation of the paragraph, they can not invoke our decisions as to its validity."

In the case at bar, since the Secretary's complaint does not charge (nor the evidence establish) that the respondent *was attempting to manipulate the market price of any grain, or that he was violating the act at the time of the institution of the complaint, the precise question* presented, is whether the act was intended to authorize purely punitive proceedings, and the question respecting the constitutionality of Section 6 (b) is precipitated by the unconstitutional interpretation sought to be given to the act by the Secretary and the Commission.

By the enactment of the Grain Futures Act, the Congress sought to reach two evils, the prevalence of which, it will appear from a reading of the Congressional investigations, had been the subject of much discussion prior to the World War—sudden and unreasonable dislocation of prices of grain as a consequence of the manipulation of such prices on the various grain markets of the country, and a correlated practice, the dissemination of false and misleading information respecting crop or market conditions. During

the World War, when grain exchanges were voluntarily placed under close government supervision, valuable experience was gained which served to point the way for the legislation.

The fundamental method adopted by the Congress in order to reach and prevent the practices complained of, was the licensing of the meeting places or markets whereon and through the facilities of which, contracts were made by individuals for the future delivery of grain. The law is based on the theory that the markets will co-operate with the Government in making the law effective. The theory of the Act is self-regulation under government supervision. There was no attempt made to license individual members of, or traders upon, boards of trade. The pertinent provisions establishing the method are found in Section 5 of the Act.

Under that section, in order for a board of trade to procure a license or designation as a "contract market" from the Secretary of Agriculture, the applicant shall: (1) be at a terminal market where sufficient cash grain is handled to reflect its market value; (2) its *governing board* shall provide for the making and filing of reports, either by its members or by the board, as the Secretary of Agriculture shall direct, and in such form as the Secretary shall direct; (3) such governing board shall provide for the prevention and dissemination by the board, or its members, of false, misleading or knowingly inaccurate reports concerning crop or market conditions; (4) such governing board shall provide for the prevention of the manipulation of prices for the cornering of any grain by dealers or operators upon such board; (5) shall provide for admitting co-operative associations of producers to membership; and (6) provide the means for making effective orders under Section 6 (b).

It will be observed that the making of reports, whether by the board or by the members, the prevention of manipu-

lation or the cornering of any grain by dealers or operators on such boards, the means of making effective exclusion orders under Section 6 (b), are all made a *condition* to the license or designation of the contract market. In order to procure such designation, *not only* must the applicant make a showing that it complies with the statutory requirements, but it must likewise supply assurance *"that it will continue to comply with the above requirements."* The text of the act reflects the philosophy, that if boards of trade were likely to suffer the loss or suspension of their respective licenses or designations, either because reports were not provided for and rendered as required, or because grain was cornered and the prices thereof manipulated by the dealers or operators upon such board, such fear would automatically compel a close supervision and policing of the contract market by its own governing board or elected officials. In marked contrast to the Commodity Exchange Act,* now pending before the United States Senate—the Congress thought in 1922, to avoid a decentralization of responsibility which would have been occasioned by a more direct and detailed supervision of the many individuals who might choose to engage in the business of trading in cash grain or grain futures, whether as principal or otherwise.

It is against this background of approach, so manifest in the structure and in the administration of the act, that the provisions of Sections 6 (a), 6 (b), and 9 are to be considered.

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*H. R. 6772, 74th Congress, 1st Session, passed by the House on June 3, 1935, and now pending in the Senate, converts the present Grain Futures Act to the "Commodity Exchange Act," extends and expands the governmental supervision over trading in grain and other commodities, provides for the licensing of commission merchants and floor brokers, *specifically amends Section 6 (b) to include past violations of the act,* creates cease and desist orders, and provides criminal punishment for the disobedience thereof. (Italics ours.)

PERTINENT SECTIONS COMPARED.

Under Section 6 (a), whenever it is made to appear to a commission composed of the Secretary of Agriculture, Secretary of Commerce, and the Attorney General, that a contract market "has failed or is failing" to comply with any of the requirements made a condition to its designation, it may be ordered suspended for a period *not to exceed six months,* or its designation as such contract market revoked. Such proceedings must exhibit the following characteristics:

(a) There must be a notice to the officers of the contract market and a hearing.

(b) The order of suspension or revocation does not become final and effective until fifteen days after its issuance.

(c) If, within said fifteen-day period an appeal be perfected to the circuit court of appeals for the district in which is located the principal place of business of the market, the order of suspension does not become effective *until the disposition of the appeal.*

The provisions of Section 6 (b) are in marked contrast.

First. Since whatever peril there may be of manipulative practices, is far more likely from those not members of, and subject to, the disciplinary action of boards of trade than from the members of such boards, the Secretary is authorized to direct his complaint against *any person.*

Second. The Secretary of Agriculture must *have reason to believe* that the accused person *is violating* some of the provisions of the act, or *is attempting to* manipulate the market price of grain, in violation of the provisions of Section 5, or of the rules and regulations made by boards of trade pursuant to the requirements of said Section 5. It is not for a mere failure to have filed reports, or, for having filed inaccurate reports, apart from any attempt to manipu-

late, that proceedings are authorized. Current attempts to manipulate the market price of grain are the activities reached by the interdict of the Commission. The Secretary's belief in the existence of a present practice is the jurisdictional basis for the initiation of the complaint.

Third. Upon the issuance of a complaint conforming to the statute, a hearing may be held upon three days' notice.

Fourth. The hearing may be held by the Commission at Washington, D. C., or by a referee designated by the Commission.

Fifth. The burden of disproving the charge of manipulative practice is placed upon the accused. Thus, for any reason sufficient to arouse a belief, whether it be based upon evidence submitted, or merely upon gossip or false rumor, the Secretary may issue a complaint compelling the accused to assume the burden of disproving charges contained in the complaint.

Sixth. An order may be entered excluding the offender from all contract markets for such period as shall be fixed by the Commission, and such an order is to be sent to the markets and carried into execution forthwith.

In the event of appeal, the section, *by its terms,* grants no right to a supersedeas, as in the case of Section 6 (a), and whether or not such order of the Commission shall be stayed during appeal rests entirely in the discretion of the circuit court of appeals, and turns on the merits of the application therefor. Unless the Congress had in mind a present and pressing situation, there would have been no reason for not allowing the accused the right to supersedeas as in the case of the contract market in the immediately preceding section.

In Section 9 of the act, the Congress *selected and provided* the punishment for those acts deemed by it of sufficient importance to be treated by criminal prosecutions.

Under that section, if any person shall violate Section 4 of the act (making contracts of sale of grain for future delivery illegal—unless on the contract markets or within the exceptions to the act), or shall fail to evidence any contract of sale by a record in writing, or shall knowingly or carelessly deliver through the mails or in interstate commerce, false or misleading information concerning crop or market conditions, he shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both. The section does not declare a punishment for manipulation or attempts to manipulate the market price of grain, for the reason that a punishment was already provided for such offenses in the then existing statutes. Section 2 of the Anti-Trust Act of 1890 (U. S. C., Tit. 15, Sec. 2) provides that: "Every person who shall monopolize, or attempt to monopolize, or conspire with any other person or persons, to monopolize, any part of the trade or commerce of the several states" shall be guilty of a misdemeanor punishable by a fine or imprisonment, or both. It was this law upon which the prosecution in the case of *United States* v. *Patten,* 226 U. S. 525, was based, in which the complaint charged a conspiracy to corner the cotton market.

Thus from all of these sections is the legislative pattern of regulation to be gathered.

First: The Secretary may proceed, before the Commission, against *the contract market* and seek to revoke its designation as such whenever it appears that it "has failed or is failing" to enforce rules and regulations designed to prevent manipulation or is not otherwise complying with the conditions of its license.

Second: If the Secretary has reason to believe that *any* individual *is violating* any of the provisions of the act, or is attempting to manipulate the market price of grain, he may proceed in the manner contemplated by the section to

frustrate and prevent the successful consummation of the violation or of the manipulation.

Finally: If the violation happens to be one covered by the provisions of Section 9 of the act, the Secretary may, (1) if the practice is being employed at the time, and in order to prevent its successful culmination, close all contract markets to the offender (under Section 6 (b)), and (2) cause the institution of criminal proceedings in respect of such violations as appear to have been consummated, either under Section 9 or under the provisions of the Sherman Anti-Trust law.

INTENT OF THE ACT.

It is submitted that by Section 6 (b) the intent and purpose of the Congress was to provide the Secretary of Agriculture with a summary process only, whereby, acting upon an existing abuse as such, the Secretary would be enabled to purge the market of manipulative practices *at the time* of the alleged occurrences. Under this interpretation of the section, whenever the Secretary proceeds against an offender upon the belief that a practice is then being employed which is manipulative, the Commission would determine the guilt of the offender, *not* for the purpose of fixing a punishment, but for the purpose of determining the existence of and purging from, the contract market the manipulative practices. The determination of the guilt of the offender is, under such circumstances, merely *incidental* to clearing the market of a then existing abuse. The fact, that, in contrast to Section 6 (a), the period of suspension is placed solely within the discretion of the Commission, and no maximum period is fixed in Section 6 (b), is further proof that the suspension is designed for prophylactic and not for punitive purposes.

On the other hand, when the Secretary, as he does

in the case at bar, charges that the respondent *has attempted* to manipulate the market and it appears that such violations occurred *more than three years prior* to the complaint, no proper administrative purpose is being even *prima facie* subserved, and the undisguised object of the proceeding is the punishment of the offender. The last is a function, we submit, not authorized by the text of Section 6 (b), because if it was, the section would be unconstitutional for failure to afford a jury trial, and for contemplating the assumption of judicial duties by persons and individuals not authorized by the Constitution to discharge such functions.

As bearing on the likelihood that the Congress contemplated that punishment for an attempt to manipulate prices could be held in suspension indefinitely (because if the Secretary of Agriculture is permitted to invoke this section after three years, there is no reason why he could not invoke it after ten years), it is interesting to note the expressed national policy as to punishment for much more serious offenses.

Prosecutions of offenses under the Bankruptcy Act must be instituted within one year (U. S. C. A., Tit. 11, § 52 (d)), courts-martial for all offenses other than desertion, mutiny and murder must be prosecuted within two years (U. S. C. A., Tit. 10, § 1510), and prosecutions of all other criminal offenses against federal laws, except wilful murder, and offenses involving the defrauding of the United States, are barred in three years (U. S. C. A., Tit. 18, §§ 581, 582).

Respondent does not concede, even under the foregoing interpretation of the act, that the section is a constitutional enactment, but, since the complaint in this case did not charge that the respondent was attempting to manipulate the market price of any grain at the time the complaint was brought, *the precise question* presented is whether Section 6 (b) was intended by the Congress to apply to

complaints where the offenses complained of are not alleged to be presently occurring and where the suspension order is requested as a punitive, not an administrative remedy.

The section must also be considered in the light of the practicalities of future trading. Trading in grain futures begins, usually, eight months prior to the delivery month. It may be assumed, for the purposes of illustration, that Smith is attempting to manipulate upward the market price of July wheat by acquiring an extremely "long" position, calling for the delivery to him of wheat during July, and not later than July 31st. If during July his contracts therefor, exceed the supply of wheat available for delivery, a corner seems imminent. As a result of gossip, or reports, either from individuals or from commission houses, or from the volume of trading in futures, or from the apparent price trend, or from complaints, or from a special call for reports issued to the contract markets, the exchange supervisor has reason to suspect Smith. It is reported to the Secretary of Agriculture. Being so advised, a complaint may be then initiated and served upon Smith charging the attempt to manipulate and calling for a prompt hearing before the end of the delivery month. The object of the Secretary under this hypothesis is not a punishment of Smith for past misconduct but administrative action on the Secretary's part primarily and fundamentally designed to purge the market of the manipulative practice and its possible result. As a *practical matter,* the very service of such a complaint upon one who had such a market position, would almost immediately result in forcing the accused to liquidate his holdings, the effect of which would be to make available a supply of that future of wheat and bring about a breaking up of the threatened corner. A desire to avoid the possible consequences of the hearing, would in the very nature of things bring about such an

immediate change in market conditions that it would probably be even unnecessary to proceed to an actual hearing on the complaint. By this method, did the sponsors of the legislation contemplate to rout an individual manipulator, not long after public good could be subserved, but at the very moment of the practice. A successful consummation of the manipulative scheme is thus prevented, which is all that the Congress of 1922 intended to accomplish. This, the respondent submits, was and is, the obvious intended purpose and scope of Section 6 (b), and a common-sense interpretation of the text thereof. It is not intended to be a section whereby each trifling violator, who had or had not filed a report, was to be summoned before a commission consisting of three busy cabinet officials, three years after the alleged violations occurred, thus transforming the commission and reducing it to the level of a police court.

It is submitted that even when viewed from an administrative viewpoint, this construction of Section 6 (b) which is within the language actually used, has much to commend it. Aside from the proposition that the Congress so stated and so intended, is it not preferable to construe this act as providing a means for the prevention of abuses, rather than to construe it as providing for the punishment of individuals long after opportunity for correction has passed? Construing the statute as authorizing punitive proceedings permits of administrative inaction.

In the case of *Lake County* v. *Rollins,* 130 U. S. 662, at page 670, this court said:

> "To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face

of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. *Newell* v. *People,* 7 N. Y. 9, 97; *Hills* v. *Chicago,* 60 Illinois, 86; *Denn* v. *Reid,* 10 Pet. 524; *Leonard* v. *Wiseman,* 31 Maryland 201, 204; *People* v. *Potter,* 47 N. Y. 375; Cooley, Const. Lim. 57; Story on Const. Sec. 400; *Beardstown* v. *Virginia,* 76 Illinois, 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. *United States* v. *Fisher,* 2 Cranch. 358, 399; *Doggett* v. *Florida Railroad,* 99 U. S. 72."

LEGISLATIVE HISTORY BEARING ON POLICY.

It is, of course, a settled principle of law reflected in the decisions of this court, that where, as in the case at bar, the language of a statute is plain, certain and unambiguous, there is no room for statutory construction (*Helvering* v. *New York Trust Co.,* 292 U. S. 455, 464) and, therefore, resort to testimony taken in committee hearings, reports of committees, and Congressional debates, is neither necessary nor usually permissible. However, the petitioners seek to convince the court that there is *another* meaning implied, if not expressed, in the statute, and therefore, for the purpose of indicating the *policy* of the act, and as vindicating the decision of the Circuit Court of Appeals respondent desires to make brief reference to certain excerpts from the legislative history of the Future Trading Act, and the Grain Futures Act.

Representative J. N. Tincher of Kansas had been the sponsor of future trading legislation in the House of Representatives, and Senator Arthur Capper of Kansas was the sponsor in the Senate. The original future trading legislation had been known as the Capper-Tincher bill. While both of these men were active leaders in the advance-

ment of the legislation in their respective branches of Congress, the reports of committee hearings and the Congressional discussions indicate that Mr. Tincher had a deep, abiding, and active interest in the furtherance of the legislation. He actively interested himself in the committee hearings, and attended not only the committee hearings held by his own committee, but as well the committee hearings of the Senate Committee.

As furnishing some indication of the frame of mind and the philosophy of approach of one of the sponsors of the legislation, we have quoted in the margin* an exchange

*From page 183 of Hearings before House Committee on Agriculture and Forestry on Future Trading, 67th Congress, 1st Session, April 25, 26, 27, 28, 29 and May 2, 1921.

"Mr. Aswell: Why could not this matter be referred to the Federal Trade Commission?

Mr. Tincher: I do not want it to die. The Federal Trade Commission only investigates and makes reports and they are printed at some time. I want it distinctly understood that I think the Federal Trade Commission has some function in Government, and do not want you to misunderstand my statement here; *but I do not want the Secretary of Agriculture to wait thirty days even if there is some violation of this law* * * *

Mr. Griffin: The difficulty is that the Secretary of Agriculture under this proposed bill does not ask the exchanges to cease and desist *but he revokes their designation as a contract market* * * *

Mr. Tincher: How would this fit the case: *Such revocation shall be only after notice to the officers of the board of trade and opportunity offered them to cease and desist in the practiced complained of or to correct the violation complained of.* And then provide that after the Secretary of Agriculture shall have made an order, if you want to, and I see no objection to it, the party complained of shall have the right of appeal from the revocation.

Mr. Griffin: That would harmonize exactly with my views. I am after the substance and not the form, for after the substance is agreed to, the form can be worked out.

Mr. Tincher: What I want is for the *Secretary of Agriculture to have the right to stop any improper practices then and there.* If he is wrong about the practice complained of and the exchange is right, I want to leave that authority with some Government official and not with the exchange * * *" (Italics ours.)

of comments occurring while the House Committee was considering bills designed to regulate future trading in grain. As petitioners suggest, at the time that these remarks were made, Section 6 (b) *was not* a part of the act, being added in the Senate Committee, but the comments serve now, to furnish some indication of the *background* and *purpose* of a bill of which the section became a part and to which it would obviously have to conform. From Mr. Tincher's remarks it is manifest beyond doubt that the objective of the legislation was the creation of a method or methods to prevent and stop manipulative practices—punishment as such was a secondary consideration.

Section 6 (b) was added in the Senate Committee hearings, (and we shall have occasion hereinafter in this argument to discuss the origin thereof and to demonstrate that its text is not a mere "inadvertence") but it will appear from Mr. Tincher's remarks,* made in the House during a debate of the amendments proposed by the Senate, that prevention of manipulation was then, and is today, the primary purpose of the legislation.

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*From Congressional Record, pp. 5559, *et seq.*, 67th Congress, First Session, Part 6, Volume 61, August 22-October 20, 1921:

Mr. Tincher: Mr. Speaker and gentlemen of the House, I think every Member who has followed the bill will agree that the only changes made in the Senate are changes in the language, that the gentleman from Pennsylvania (Mr. Kelly) called attention to. As the bill passed the House it authorized the Secretary of Agriculture to designate places as market places and required the exchange to file an application in which they would include limitations upon trading. In the Senate they had considerable discussion over that proposition, and, of course, the difficulty of that proposition is apparent to anyone. One season of the year limitation in transactions in grain is reasonable, and at another season of the year it would be unreasonable. In one year certain limitations would be reasonable and another year it would be unreasonable. *It was deemed best by the friends of the measure to give the Secretary of Agriculture the power to prevent manipulations.* The question of the definition of the manipulation of the market came up. I attended the hearings in

One year later, when, after the decision in the case of *Hill* v. *Wallace*, 259 U. S. 44, the House Committee was considering the present Grain Futures Act, one of the witnesses before the committee had pointed out to the committee that in spite of the fact that the avowed purpose of the legislation was to prevent manipulation, no penalty was provided therefor. Mr. Tincher's response* clearly demonstrates that this most active leader in the Congress on the subject under discussion, was well aware that the act did not and does not provide either a penalty or a punishment for those who have manipulated prices. There is, of course, no such provision in the act. Congress placed *prevention* of manipulation above punishment. Notwithstanding, the Secretary of Agriculture insists in this court that *he* should be permitted to accomplish that which the Congress did not see fit to authorize—that *he* should be allowed to constitute himself prosecutor, judge and jury,

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the Senate and the debate on the floor of the Senate, and I finally agreed to these changes on this theory, that so long as there was no legal definition of manipulation, the Secretary of Agriculture had the power to require rules and regulations on the part of the exchange to prevent manipulation of prices, and, perhaps, we could not afford to complain of the fact that there was no definition of manipulation.

Mr. Kelly of Pennsylvania: Is the gentleman from Kansas assured that the Secretary of Agriculture has the power to prevent manipulation if it is necessary?

Mr. Tincher: Yes; and, inasmuch as there is no definition, he is the judge of it himself.

*From page 35 of Hearings before Committee on Agriculture, House of Representatives, 67th Congress, Second Session, June 7, 8, 9, 12, 1922, Grain Futures Act.

"Mr. Tincher: You suggested a while ago that this bill does not prescribe a penalty, that it does not provide a *punishment* for manipulating the market. You are entirely right about that, because we have a law now that does that. *The object of this bill was not to punish some man that manipulated the market, but to prevent manipulation.*" (Italics ours.)

Mr. Gates: Yes; but even though you assume it will prevent it, you have no penalty for it.

Mr. Tincher: Well, we have a Federal law that provides a penalty for it, and that law does not prevent it."

and inflict a penalty upon accused individuals of his own selection and for a period of his own duration—else the act becomes a "nullity."

In the light of the text of the act and the history of the legislation, respondent submits that the *most favorable* constitutional view that can be taken of Section 6 (b) is that it was intended *only* to vest with the Secretary of Agriculture, an alternative and subsidiary method by which he could, if the occasion arose, stop a then existing practice without the necessity of resorting to the revocation of the license of the contract market. The law contemplated that if continued and repeated manipulations took place through the facilities of the contract markets, that then the governing board thereof must necessarily be at fault, and that *future adherence* to the law would be brought about by the disciplinary action meted out to the licensed board of trade or contract market involved. It is respectfully submitted that this particular proceeding was not brought within either the letter or the spirit of the Act, and that the Circuit Court of Appeals correctly and accurately construed the section involved.

PETITIONERS' CONTENTIONS DISCUSSED.

At considerable length petitioners have discussed the nature of the reporting requirements, the relationship thereof to the prevention of manipulation, posing conveniently extreme hypothetical cases, *no one of which is present on the facts of this case* as the standard for analysis. Petitioners have chosen to ignore the ultimate and fundamental charge made against this respondent, and one necessary in order to bring the proceedings within the scope and purpose of Section 6 (b), namely, that the respondent during 1930 and 1931 attempted to manipulate the market price of grain. It is asserted in criticism of the holding by the Cir-

cuit Court of Appeals that "such opinion eviscerates the act, and, if sustained, failures to report would probably occur in wholesale fashion and thereby wreck the regulatory scheme." The entire argument proceeds upon a false assumption, and petitioners betray an unsuspected lack of appreciation of the policy and structure of the Grain Futures Act.

Section 6 (b) of the act is concerned with and directed against the frustration of attempts to manipulate the market price of grain, and the current dissemination of false crop and market information. It is not concerned with the enforcement of the reporting requirements as such. The latter is primarily the responsibility of the governing board of the contract market. Under the provisions of Section 5 (b), it is definitely and precisely made a condition to the continued existence of the contract market that the governing board thereof provide for the making and filing of reports *either* by the board, or by the members thereof, as the Secretary of Agriculture may direct. Thus the question of which method shall be employed, is left entirely in the hands of the Secretary of Agriculture, and thus the final and ultimate responsibility for the adequacy of reports and compliance with the requirements is placed squarely upon the shoulders of the *governing board* of the contract market. The construction adopted by the Circuit Court of Appeals in this case cannot "wreck the regulatory scheme" because, if for any reason, the Secretary is dissatisfied with the method, or results achieved in procuring reports from individual members he can change the method and require the board to provide the reports. We dare say that the very threat to board officials that it would have to set up a comprehensive mechanism to procure compliance with reporting requirements would be sufficient to bring about and correct any wholesale neglect in the reporting requirements.

Furthermore, it will appear from the comments of Mr. Tincher appearing in the margin,* which were made while this very question was being discussed in the House Committee on Agriculture and Forestry, that, as one of the sponsors of the legislation, he was unwilling to provide a method which would permanently decentralize responsibility by requiring the Secretary of Agriculture to pursue every individual member of the market in order to procure reports. Section 6 (b) was not then part of the Act, but it is submitted that, in the interest of both centralized responsibility and economy, the Grain Futures Act of 1922 made the responsibility for the filing of reports in such form as the Secretary shall direct, a condition to the continued existence of the contract market. It is therefore idle to argue that unless the provisions of Section 6 (b) are construed as contended for by the petitioners, that the regulatory scheme will be wrecked.

Bartlett Frazier Co. v. *Hyde,* 65 Fed. (2d) 350, (cert. den. 290 U. S. 654) was concerned primarily with the right of the Grain Futures Administration to *inspect* books of the commission houses.

Petitioners profess an inability to understand respondent's assertion in the brief filed in opposition to the petition for writ of certiorari that "in each case the inquiry is one of fact." (Respondent's Brief in Opposition to Writ of Certiorari, p. 13.)

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*From hearings on "Future Trading" before Committee on Agriculture, House of Representatives, 67th Congress, First Session, on H. R. 168, 231, 2238, 2331, 2363, 5228, April 25, 26, 27, 28, 29, May 2, 1921:

Page 174:

(After discussion with witness and various committee members relative to reports.)

"Mr. Tincher: I did not want the Secretary of Agriculture to have to go to the two hundred firms out there and I did not want him to have to have any fuss with any firm. I wanted him to have his fuss with the exchange, because the exchange has more power over its members than anybody else."

It is respectfully submitted that whether applied to infractions of the reporting requirements *and* attempts to manipulate, as the petitioners contend, or whether applied *only* to present attempts to manipulate the market price of grain, as respondent contends, or both, the ultimate question to be determined in every case arising under Section 6 (b) is whether the evidence will reasonably justify, and lead the mind to, the conclusion that the accused individual is engaged in violating the act, or is attempting to manipulate the market price of grain. In one of the very cases cited by the petitioners, and relied upon by them in another connection, *Farmers' Livestock Commission Co.* v. *United States,* 54 Fed. (2d) 375, it was charged by the Secretary of Agriculture that the plaintiffs in that case were *participating* in unfair and unjustly discriminatory practices, in violation of the Packers and Stockyards Act of 1921, as a consequence whereof the Secretary, in pursuance of Section 309 of the Act, instituted an investigation. In that case the Secretary found that plaintiffs *were participating* in an illegal boycott as charged, and suspended their registration as market agencies for a period of ninety days—specific provision being made in that legislation for the suspension of registration. The cited case is an authority for the proposition that the Secretary of Agriculture has found no difficulty in proceeding under statutes of this character.

FILING OF COMPLAINT NEED NOT BE DELAYED FOR EXTENSIVE AUDITS.

It is said that the amount of time necessary to expose violation is not always within the Commission's control, and petitioners point to the fact that representatives of the Administration consumed over two years in auditing books and checking records for the purpose of assembling the data, statistics and charts produced on the hearing. The

phraseology of Section 6 (b) neither contemplates, nor requires, a detailed preparation of audits.

In respect of this case, as we have already pointed out, no request was made of this respondent at any time, or at any place, for reports back of the date of November 1, 1931. The reports filed by him, in March of 1932, for the four months preceding were in order. (R. 166.) No difficulty was encountered in *ascertaining* any information. *The fact is established by the undisputed testimony of Messrs. Uhlmann* (R. 59), *Rigg* (R. 75), *Wade* (R. 87), *Prescott* (R. 98) *and Young* (R. 106) *that the accounts involved were known to and examined by the auditors for the Grain Futures Administration during 1930 and 1931.*

It is said by petitioners (Br. p. 50) that not only did the respondent fail to report, but the firms with whom the accounts were carried also failed to report. *The Commission made no finding of fact to this effect, and the statement is misleading.* The commission houses did report to the Grain Futures Administration during 1930 many accounts over 500,000 bushels (R. 149). However, due to the general custom and understanding in La Salle Street which prevailed until the summer of 1933, such houses did not combine all accounts appearing on their books and report them in accordance with what petitioners contend the regulations mean (R. 88, 89; R. 111, 112).

TIME CONSUMED BY PROCEEDINGS.

The next argument advanced by the petitioners in support of their contention that Section 6 (b) should be construed as *also* authorizing purely punitive proceedings, is that the period of time necessary for the hearings contemplated by the act is so long as to be inconsistent with an attempt to provide prompt action. We take issue with that assertion. It seems to us that when fairly viewed in all its

aspects the proceeding is extremely summary in character—so extremely summary that respondent declines to concede the constitutionality of the section, even in the light of what its plain language contemplates. Petitioners argue, however, that although only three days' notice is required, that the evidence must be reduced to writing; that busy cabinet officers must hear the charges; all of which, it is asserted, is inconsistent with a prophylactic purpose or objective. In respect of the question whether or not Section 6 (b) is summary in character, the test is *not* that period of time which a benign secretary or commission *may* grant to the accused, but what that accused is *entitled* to under the act. By virtue of the text of Section 6 (b) the accused is only *entitled* to three days' notice. Any period in excess of three days depends upon the Secretary's frame of mind. Under the language of Section 6 (b), the burden of showing and establishing to the Secretary why he should not be barred from all contract markets is placed upon the accused, thus by the very language of the section implying that either a *bona fide* explanation, or promise of future compliance, is sufficient to discharge the burden. The hearing *may* be held at Washington, and need *not* be held at any other point in the United States if the Secretary so determines. The Secretary may, but he need not, designate a referee. Thus, if the Secretary wishes to accelerate the proceedings in the face of what, it may be assumed, is a critical market situation, Section 6 (b) is plainly susceptible of a policing procedure, which would set the hearing down before a full commission within a period as short as five days, and, since the Commission may make its own rules of procedure, oral arguments, briefs, etc., need not be had or filed in any proper case regarded by the Commission as pressing and in which the fundamental *inquiry is one of fact.* This demonstrates

clearly the summary and peremptory character of the proceedings contemplated by the act, and illustrates our contention that the speed with which the proceeding *is consummated* is entirely in the hands of the Secretary of Agriculture and the Commission.

Petitioners have referred to the fact that overburdened cabinet officials are required to serve as members of the Commission. With petitioners, respondent shares a regret that duties of such character are imposed on such responsible officials. But the petitioners would require such officers to perform a merely magisterial type of duty long after any public good could be subserved. We hold no brief for a statutory scheme which requires such cabinet officers, already overburdened with duties, to act as policemen for contract markets, but as long as the act is limited (as it is under Section 6 (a)) to the revocation of the license of the contract market—such markets are not very numerous; and if, as we contend, the Commission deals, under Section 6 (b) only with situations where the Secretary alleges a present manipulation, which would undoubtedly be of national consequence, some real public service is being rendered and no great burden is imposed on the Commission. On the other hand, to torture the plain words of the section, in order to punish for alleged violations three years old, and after the particular crops involved have been harvested, converted, and consumed and thus place *more* onerous and ineffective duties on these officials in order to justify this particular proceeding, does not appear to us as sensible.

PETITIONERS' CASES DISTINGUISHED.

Under Point II of their argument (p. 69 *et seq.*) petitioners have asserted that Section 6 (b) should be given a practical meaning. Respondent joins in that statement, and respectfully insists that such practical meaning has

been fully and clearly pointed out. But, say the petitioners, the choice here is between "meaning and nullity." We challenge that proposition. The choice here is between the meaning, so definitely expressed, and a plan of regulation discernable in the statute, and the petitioners attempt to acquire, by construction, a power not expressed and which, under our Constitution, Congress itself could neither exercise nor confer upon any administrative agency.

Petitioners cite the cases of *Church of the Holy Trinity* v. *United States*, 143 U. S. 457; *United States* v. *Kirby*, 7 Wall. 482; *Reiche* v. *Smythe*, 13 Wall. 162; *Silver* v. *Ladd*, 7 Wall. 219; *United States* v. *Lacher*, 134 U. S. 624; *United States* v. *Katz*, 271 U. S. 354; *Sorrells* v. *United States*, 287 U. S. 435; *The Emily*, 9 Wheat. 381; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84; *Ash Sheep Co.* v. *United States*, 252 U. S. 159; *United States* v. *Corbett*, 215 U. S. 233; *Johnson* v. *Southern Pacific Ry. Co.*, 196 U. S. 1; *United States* v. *Bowman*, 260 U. S. 94; *Hawaii* v. *Mankichi*, 190 U. S. 197.

One central theme runs throughout these cases which it is impossible to dispute: All laws should receive a sensible construction. In some of the foregoing authorities the construction of penal statutes, when ascertained, required a holding that the accused individuals were not within either the spirit or the intent of the legislation; in others, it was held that it would defeat the obvious intention of the enactment to hold that the accused individuals were *not* within the intent of the statute. In one case the word "man" was construed to include "woman." In another, the word "cattle" was construed to include "sheep." The cited authorities represent sound dispositions of the particular situations and the particular statutes there involved, but no one case is, on its particular facts, applicable here.

The court will note, however, that even in the cases cited

by the petitioners, the language of statutes penal in character, was never unnecessarily extended beyond its plain meaning in the process of construction. *United States* v. *Corbett*, 215 U. S. 233, 243.

Petitioners also cite the cases of *The Sterling*, 65 Fed. (2d) 439; *Huidekoper's Lessee* v. *Douglas*, 3 Cranch. 1; *Heydenfeldt* v. *Dancy Gold, etc. Co.*, 93 U. S. 634; *Hayden* v. *Ortkeiss*, 83 Ky. 396; *Louisville Southern Railroad Company's Receivers* v. *Lewis*, 101 Ky. 296, 41 S. W. 3; *Malloy* v. *Chicago & North Western R. Co.*, 109 Wis. 29, 85 N. W. 130; *Rutherford* v. *Greene's Heirs*, 2 Wheat. 196; and *Maysville & Lexington R. R. Co.* v. *Herrick*, 76 Ky. 122. With the exception of *The Sterling*, 65 Fed. (2d) 439, all of the foregoing cases reflect situations wherein the legislature sought, or intended, to assist persons, or to afford a remedy for some distressing situation. The statutes were remedial—as distinguished from penal statutes. The former are to be liberally construed—the latter are to be strictly construed, although no obvious intent will be disregarded. Cases, therefore, which deal with remedial statutes, enacted for the purpose of assisting persons, and which, unlike penal statutes, are to be liberally construed, hardly support the contention that the provisions of Section 6 (b) are to be so construed as *to include* the power to inflict a punitive penalty. Furthermore, in respect of the language of Section 6 (b), there is little room for debate. The language is plain and unambiguous. The use of the present tense throughout the section is in marked contrast to that of the preceding section and occurs, not once but twice, in connection with the proceedings authorized.

In the case of *The Sterling*, 65 Fed. (2d) 439, the words there involved were obviously plainly employed as words of past tense; furthermore, the forfeiture took place on the commission of the act, and the later libel proceedings were merely steps relating back to the time of the forfeiture. An

entirely different intent is manifested in the statute here under consideration.

When isolated from the setting of cases with which petitioners' proposition is surrounded, petitioners' contention amounts to an invitation to this court to construe the phrase "is violating" and the phrase "is attempting to manipulate the market price of any grain" as if the respective phrases contained the words "has violated" and "has attempted" notwithstanding that this construction would take in *all* violations under the act, the criminal punishment for some of which is already provided for by Section 9. It is submitted that such a construction is contrary to the accepted principles which govern the construction of statutes penal in their general character.

THE APPROPRIATE RULE OF CONSTRUCTION.

Since Section 6 (b) employs language diametrically opposed to that of the preceding Section 6 (a), and since, taken with all the other sections of the statute, it clearly evidences the desire to reach and cure a present situation only, there is to be employed the rule of construction referred to in the case of *Commonwealth* v. *Woodring,* 289 Pa. 437, 137 Atl. 635, at p. 639, where, in dealing with the antithetical use of the words "shall" and "may" in the same statute, the Pennsylvania court said:

> "This conclusion is buttressed by another rule of construction, viz., that where, in an agreement, will, or statute there is a change in the method of expression, the presumption, usually of great force, is that the intention was to give to the later words a different meaning from those formerly used. Hence, when the legislature said, in the act of 1925 that certain things 'shall' be done and, later, that certain others 'may' be done, the presumption is that it meant just what it said, else why did it not continue the use of 'shall'?"

The construction contended for by the petitioners draws

the Commission and the Secretary into a whole host of questions respecting the constitutionality of such a proceeding, all of which will be dealt with and discussed at length under Point II of this brief.

In the case of *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, at page 407, the court said, referring to a rule of construction:

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman* v. *Interstate Com. Comm.*, 211 U. S. 407."

In the case of *United States* v. *Jin Fuey Moy*, 241 U. S. 394, at page 401, the court said:

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

And in the case of *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, at page 307, the court said:

> "We cannot attribute to Congress an intent to defy the Fourth Amendment *or even to come so near to doing so as to raise a serious question of constitutional law.*" (Italics ours.)

Petitioners in this case contend for a construction of Section 6 (b) which does raise grave and serious doubts respecting the constitutionality of the section, because it

raises the question of whether or not under our Constitution, an executive or administrative agency may determine the guilt of an offender without trial by jury, in a proceeding having no other objective than the infliction of a purely punitive penalty.

SUSPENSION ORDER IS DESIGNED FOR PREVENTIVE PURPOSES.

It is suggested by the petitioners (Br. p. 86) that if Congress had intended to provide only a prophylactic process, it would have empowered the Commission to enter a cease and desist order. While it may lack legal significance, it lacks nothing of interest, to point out that when the language of Section 6 (b) is compared with the statute authorizing the Federal Trade Commission to issue cease and desist orders,* there is a noteworthy similarity in the language employed, with this exception: the Federal Trade Commission Act employs the phrase, "has been or is using any unfair method of computation." Section 6 (b) is an application of the theory of the Federal Trade Commission Act "cease and desist order" to the practicalities of the contract market.

Petitioners suggest that because the order of suspension is made operative upon all licensed contract markets, that

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*From 15 U. S. C. A. 45—

"• • • *Procedure by commission.* Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint." • • •

Congress must have had in mind punitive proceedings. Petitioners say (Br. p. 87):

> "If the purpose had been merely to check an existing course of violation, it would seem clear that the authority granted to the Commission would have been to order the denial of trading privileges upon that market or markets upon which the violation was actually continuing."

The answer to this proposition is obvious, and clearly indicates the preventive character intended for the proceeding. The Commission, having found that the accused person is manipulating upon one contract market, orders him excluded from further trading in that contract market in order to break up the practice thereon, *and orders him excluded from trading in all the other contract markets, so that the manipulative activities may not be extended from one contract market to another, or the manipulative practice thrust from one contract market only to have it successfully consummated through the facilities of another.* The fact that an accused person is found to be attempting to manipulate the market price of grain upon one market would constitute a real and present threat to the remaining licensed contract markets. There would be no point in breaking up a manipulation upon one board of trade and leaving five or six other contract markets open whereon the same manipulator might conduct his activities. The argument is utterly without force to aid the petitioners in the extension of the construction of Section 6 (b) which is contended for, and in fact is another indication of the intent of Congress to provide, not a method of punishment but a method of prevention.

THE LANGUAGE OF SECTION 6 (b) WAS SELECTED AND EMPLOYED ADVISEDLY. IT IS CLEAR AND UNAMBIGUOUS.

While admitting, that when different words are used in a statute (Br. p. 88 *et seq.*) "the difference in language may properly be regarded as mirroring a difference in intent," petitioners assert that it is improper to employ the principle in the case at bar, for the reason that Section 6 (b) originated in the Senate; and Section 6 (a), or its predecessor, in the House Committee. From this the petitioners draw the conclusion that the difference in wording was "inadvertent and not deliberate and premeditated." (Pet. Br. p. 91.)

While under well-settled principles of statutory construction, petitioners' argument has no application to a situation where the language is clear and unambiguous, it may be discussed on its merits.

Petitioners' statement that Sections 6 (a) and 6 (b) originated in different committees is not a *complete* statement of the fact. The fact is that when the Future Trading Act was passed by the House and received by the Senate Committee (as H. R. 5676) it contained a provision shown in the margin* authorizing the Secretary of Agriculture to

* From page 1394 of the Congressional Record, Vol. 61, Part 2, 67th Congress, First Session, May 5 to June 3, 1921.

"SEC. 6. That any board of trade desiring to be designated a 'contract market' shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with a sufficient assurance that it will continue to comply with the above requirements. The Secretary of Agriculture is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a 'contract market' upon a showing that such board of trade has failed or is failing to comply with the above requirements or is not enforcing its rules of government made a condition of its designation as set forth in section 5. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided,* That

revoke the designation of a contract market. During the consideration of the bill in the Senate Committee, suggestions were made that the power of revocation of the designation of the contract market be vested with a commission, and that a process be created to oust individual manipulators—as one witness put it, "if he exists, and when he exists."*

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such suspension or revocation shall be final and conclusive unless within fifteen days after such suspension or revocation by the Secretary of Agriculture such board of trade appeals to the circuit court of appeals for the circuit in which it has its principal place of business by filing with the clerk of such court a written petition praying that the order of the Secretary of Agriculture be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, and the Secretary of Agriculture shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the notice to the board of trade, a copy of the charges, the evidence, and the report and order. The testimony and evidence taken or submitted before the Secretary of Agriculture duly certified and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the circuit court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the Secretary of Agriculture or may direct the Secretary of Agriculture to modify his order. No such order of his shall be modified or set aside by the circuit court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of the Secretary of Agriculture."

*Future Trading in Grain, Hearings before Committee on Agriculture and Forestry, United States Senate on H. R. 5676, 67th Congress, First Session.

From page 408.

"Mr. Wells. The Secretary acquiesced in that and, furthermore, we believe that the bill is greatly strengthened by

The original section was completely revised in the Senate Committee by dividing it into three paragraphs: the opening paragraph, section (a) and section (b). In Section 6 (a) was preserved the right of the Commission to revoke the designation of the contract market upon a showing that such board "has failed or is failing to comply," while in Section 6 (b) the language of the section was prepared and ultimately passed in the form submitted. A comparison of the original Section 6 with Sections 6 (a) and 6 (b), as finally enacted, discloses also several changes in Section 6 (a), including one to be found in the very sentence in which the words "has failed or is failing" appeared.

To say that the choice of language in Section 6 (b) was "inadvertent" is to ignore the fact that when Section 6 was revised, the language of what is now Section 6 (a) was before the Committee of the Senate for consideration. The argument ignores the circumstance that ultimately these amendments were considered by conferees of the House and Senate and concurred in. It ignores the further circumstance that in 1922, after the decision in *Hill* v. *Wallace*, this legislation again underwent committee

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the addition which we make to section 6 in paragraph (b). This becomes paragraph (a) of section 6, and the changes throughout, as I have said, are largely the substitution of the words 'said Commission' for 'Secretary of Agriculture,' and in line 22, as it would logically follow, the wording should be, 'may direct it to modify its order.'

Now, if the manipulator is to be driven from the markets, as we all wish him to be, *if he exists and when he exists*, there is no better way of doing it than to make him directly subject to the Federal law. The moral effect of direct action against the offender rather than against the exchange will, in our judgment, be the greatest possible deterrent to any attempted manipulation.

Paragraph (b) of section 6, which we have introduced, provides for the direct action against the manipulator or *one who is attempting to manipulate.*

Senator McNary: This is an entirely new provision?

Mr. Wells: This is a new provision and, in our judgment, strengthens the bill very much, because it provides for direct action against the guilty party. • • •"

analysis and consideration before its enactment into law. It ignores the circumstance that Congress was dealing with two entirely different situations. In the one, the Congress was concerned with the rights and duties of a contract market operating pursuant to a license to be issued under the act; in the other the Congress was concerned with ways and means of *preventing* individuals, nonmembers of such contract markets, from consummating a successful manipulative practice on and through, the facilities of the contract market.

The quotation from *Sutherland on Statutory Construction* offered by petitioners at page 97 of the brief, must be preceded by the following from Lewis' Sutherland Statutory Construction, Second Edition, Volume 2, (Chicago, 1904), where it is said:

> " 'It has been a general rule,' says Blackburn, J., 'for drawing legal documents from the earliest times, which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning; and it would be as well if those who are engaged in the preparation of acts of parliament would bear in mind that that is the real principle of construction.' Whether the change be by omission, addition or substitution of words, the principle applies. Where changes have been introduced by amendment it is not to be assumed that they are without design. * * *"

In the two cases cited by petitioners, *Fleischmann Co.* v. *United States,* 270 U. S. 349, and *Pickett* v. *United States,* 216 U. S. 456, were the legislative enactments there under consideration to have been construed otherwise than as the court determined, results would have followed which would have been clearly inconsistent with the purposes of the legislation *taken as a whole.* The purpose of this Act taken as a whole, is to prevent manipulation, not to punish it. Petitioners' construction is inconsistent with that purpose.

In the case of *Interstate Commerce Commission* v. *Illi-*

nois Central Railroad Co., 215 U. S. 452, while considering the scope of the review of an order of the Interstate Commerce Commission, Chief Justice White said, at page 470:

> "Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, a, all relevant questions of constitutional power or right; b, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, c, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Telegraph Cable Company* v. *Adams,* 155 U. S. 688, 698."

It is respectfully submitted that in its opinion, the Circuit Court of Appeals was guided by well-established and well-founded principles of the law.

II.

SECTION 6 (b) OF THE GRAIN FUTURES ACT OF 1922, AS CONSTRUED AND SOUGHT TO BE ENFORCED BY THE COMMISSION, IS UNCONSTITUTIONAL.

In this subdivision of the argument, respondent addresses himself to that construction of the act entertained by the Secretary of Agriculture and adopted by the Commission. (R. 454-461.) In the ensuing pages, respondent's contentions will be first discussed, followed by a discussion of the petitioners' criticisms thereof. To support the interpretation contended for by petitioners, Section 6 (b) must be read as if it contained the bracketed words: "[has violated or]—is violating" and "[has attempted or]—is at-

tempting to manipulate." The Secretary and the Commission, having thus interpreted the section, assert the power and authority to enforce the act pursuant to that interpretation, and to penalize the respondent for alleged violations three and four years old, although there is neither alleged, nor does there appear, any present administrative necessity for the order of suspension. In view of the admitted facts it will have to be conceded that no transaction concerning a July, 1931, future in wheat could relate to a condition existing in April of 1934. The effect of the interpretation placed upon the act by the Commission is to permit the Secretary of Agriculture to institute proceedings against anyone selected by him, when no administrative necessity therefor requires—when there is not alleged any claim of, or any belief in, a present violation, and when the manifest objective of the proceeding is as a punitive and not a preventive measure. As so interpreted and sought to be enforced, it is submitted that the section would be unconstitutional, for the following reasons:

First: As an attempt to confer upon a legislative agency, the members of which are procured from the executive branch of the government, the purely judicial power to order the infliction of a penalty for the alleged violation of law.

Second: Because there is a lack of due process in that in proceedings brought to inflict a penalty, the accused is denied a trial by jury in violation of the Sixth Amendment to the Constitution.

Third: Because there is a lack of due process in that such construction would permit of a tribunal in which the complainant would be one of the judges.

Fourth: Because there is a lack of due process in that the term "manipulate" is too vague and indefinite to become the proper statutory basis for the infliction of a penalty.

This argument respecting unconstitutionality is leveled against Section 6 (b), not as the section is written, but rather as the section has been interpreted by the Commis-

sion, in holding that this proceeding is within the contemplation of the statute and that it was intended to have jurisdiction thereof.

In the opinion of the Commission (R. 458-461) reliance was placed upon the opinions of the courts in the cases of *Farmers' Livestock Commission Co.* v. *United States,* 54 Fed. (2d) 375, and *Board of Trade of the City of Chicago* v. *Wallace et al.,* 67 Fed. (2d) 402. The cases cited, however, are cases wherein there was sought to be revoked a particular license or permit theretofore granted by an officer of the executive branch of the government, pursuant to an authority specifically conferred upon him by the legislative branch of the government. The courts were not there dealing with the features of a general basic law which by its terms is applicable to every individual.

Section 6 (b) of the Grain Futures Act is applicable to "any person."

It was deliberately made so, since the assumed peril of manipulative practices is not alone from persons or corporations subject to the disciplinary action of boards of trade.

EXERCISE OF JUDICIAL POWER AND DEPRIVATION OF RIGHT TO TRIAL BY JURY.

Article III, Section 1, of the Constitution reads as follows:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior; * * *.
>
> "SECTION 2. The trial of all crimes, except in cases of impeachment, shall be by jury; * * *."

No principle of American constitutional law is better

established than the proposition that the powers of the Federal Government are divided among three separate and distinct departments. The framers of the Constitution were well versed in the principle set forth by *Montesquieu* that, "in every government there are three sorts of powers" and, "there is no liberty if the judiciary power be not separated from the legislative and the executive." (Montesquieu "Spirit of the Laws," 1748.) State constitutions which were in existence before the drafting of the federal constitution embodied and clearly expressed this principle. Thus the Massachusetts Constitution adopted in 1780 provided:

> "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; * * *"

This basic principle, enunciated in appreciation of the injustice which arises from the concentration of the judicial and executive powers in the same hands, led to the provision that all exercise of the judicial power, which includes all criminal cases, that is, proceedings to punish in the interest of the public any violation of law, must be carried to the courts established by Congress and presided over by judges who are independent of both the executive and legislative branches of the government. It is respectfully submitted that if this section were to be construed, as the Secretary has sought and as the Commission has held it must be construed, to be applicable to past conduct, however remote, then it would amount to permitting a legislative agency to institute inquiries, determine the fact of guilt, and fix the duration of the punishment in proceedings seeking the infliction of a penalty — a function which is, under our Constitution, reserved to the courts

to be discharged through the medium of a judicial trial. In this proceeding, there can be no question but that it is sought to bring about the adjudication of rights as the result of transactions which had occurred far in the past. The administrative tribunal is not concerned with finding the facts, and exercising its judgment thereon, within the limitations of a standard laid down by the Congress, as the basis for an order directing the conduct of the accused for the *future,* as is the case in the Federal Trade Commission cease and desist orders. Rather is the tribunal seeking to impose the penalty of suspension as a punishment for past transgressions. Whether a judicial power is being exercised is not to be determined by the *manner* in which a decision is reached, but by the *character* of the issue which the administrative agency undertakes to decide. In the case at bar, the issue which the administrative agency undertook to decide was the guilt or innocence of the accused, whether or not he should be punished, and if so, for what period. It is submitted that the imposition of the penalty laid down by the Commission is clearly a deprivation of the liberty of the respondent. It was accomplished in a proceeding which violated the due process clause in that the tribunal was not presided over by individuals, judges of the federal courts, and there was an exercise of judicial power by individuals not lawfully constituted.

We have found no case which better illustrates the line which this Court has already drawn between proper administrative action on the one hand and judicial action on the other, than the case of *Wong Wing* v. *United States,* 163 U. S. 228.

The national policy with respect to the admission or the exclusion of aliens is a subject matter over which the Congress exercises a plenary power—as distinguished from problems arising under the Commerce Clause of the Con-

stitution wherein the regulation of, and the control of the problem is circumscribed by limits of reasonableness. It is manifest, therefore, that that limitation which the law imposes upon the exercise of a plenary power should certainly be applicable to the exercise of a power already controlled by the bounds of reasonableness.

In the *Wong Wing* case, 163 U. S. 228, one section of the act there involved relating to the exclusion of Chinese aliens, provided that any such alien who was adjudged to be not lawfully entitled to be, or remain, in the United States should be *first* imprisoned at hard labor for a period not to exceed one year, and *thereafter* removed from the United States, the order to be made by any judge, justice or commissioner of the United States without a trial by jury.

The question thus presented by the case was whether the Congress could promote its policy in respect to Chinese persons by *adding to the provisions for their exclusion and expulsion,* a provision for their punishment by imprisonment at hard labor. In other words, the particular administrative or executive functions placed upon the executive officials were (a) the keeping of Chinese aliens out of the country, and (b) the expulsion of such Chinese persons as were already found to be unlawfully in the country. This law, however, contemplated that, in addition to the *executive* or *administrative* function of identifying and expelling the alien, and as part of such function, the alien could be ordered imprisoned at hard labor, without a trial by jury and upon the order of any judge, justice or commissioner of the United States. This Court held the section invalid, and in the opinion, at page 236, it is said:

> "Our views, upon the question thus specifically pressed upon our attention, may be briefly expressed thus: We regard it as settled by our previous deci-

sions that the United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.

But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, *must provide for a judicial trial to establish the guilt of the accused.*

No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. *It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.*" (Italics ours.)

In other words, as long as an executive officer sought merely to prevent aliens from coming in, or confined his activities to identifying and then expelling those unlawfully in, he acted within the scope of appropriate executive authority. The necessity for judicial intervention arose when the deprivation of liberty was resorted to as the punishment for being unlawfully within the United States, and not as part of the administrative control of an existing situation. So, in the case at bar, while it might be arguable that the Congress could lawfully devolve upon

the Secretary and the Commission the power of *detecting* and *preventing* manipulation, it certainly could not also lawfully devolve upon the Commission the power of determining the guilt and punishment of offenders, for past violations having no relationship at all to present conduct or administrative necessities. The latter proceedings, in their fundamental characteristics, are trials in which penalties are sought to be inflicted.

Justice Field, in the case of *Cummings* v. *State of Missouri*, 71 U. S. 277, wrote, at page 320:

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment."

He further said, at page 321:

> "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined."

As administrative action has developed in this country, it is concerned with the proper treatment of a present situation, or with the ascertainment and declaration of some rule of conduct for *future action*. In a lecture contained in "The Growth of American Administrative Law," Thomas Law Book Company (St. Louis, 1923), the late Professor Freund said, at pages 16-17:

> "What is it that distinguishes administrative action

> from judicial action? It is that judicial action presupposes some controversy or alleged wrong or delinquency, whereas administrative action operates as an incident in the normal course of affairs. Many persons go through life without getting into courts of justice; few can avoid contact with administrative authorities."

In a dissenting opinion in the case of *Central Pacific R. R. Co.* v. *Gallatin,* 99 U. S. 750-761, at page 761 of the opinion, Justice Field wrote that which, while it is contained in a dissenting opinion, is of general application as a proposition of law. He wrote:

> "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions."

In the instant case, the Secretary makes no complaint that the respondent was, at the time of the institution of these proceedings, either "violating" the act, or "attempting to manipulate the market price of grain," which necessitated the intervention of an administrative remedy. The Commission was asked to concern itself solely with the question of determining the guilt or innocence of the accused with respect to past transactions, and the determination of a penalty to extend in the future. The penalty of suspension was inflicted as an expiation for the alleged transgressions.

In this connection, the *interpretation* placed by the Secretary and by the Commission upon Section 6 (b) does not differ in principle from *legislation* which was before this court in the case of *Champlin Refining Co.* v. *Commission,* 286 U. S. 210. In the *Champlin* case, the court was con-

cerned with the question of the constitutionality of an act of the State of Oklahoma providing for the regulation of oil-producing agencies. The legislation made it unlawful to produce petroleum in such a manner or under such conditions as to constitute "waste." Section 8 of the act made certain violations misdemeanors, punishable by fine or imprisonment. Section 9 of the same act also provided that in the event of a violation, the State of Oklahoma, through its Attorney General, might apply *for the appointment of a receiver to operate the producing wells of the violator and to market the production thereof.* In other words, there was virtual seizure of the violator's property by representatives of the state, which, in effect and in substance, is not unlike the order of suspension in this case which operates to remove the respondent from the field of business activity for an unreasonably long length of time. A proceeding was instituted under Section 9, and one of the questions raised on the appeal was the constitutionality thereof. This court held the section unconstitutional on the ground that it was not regulatory, but imposed a penalty purporting to punish violations of regulatory provisions of the act which were too vague and indefinite to furnish a standard of conduct. The court said, at page 240:

> "The context and language used unmistakably show that the section imposes a penalty and is not a measure in the nature of, or in aid of remedy by, injunction to prevent future violations. By § 6 the commission—which in respect of such matters is a court of record (state constitution, Art. IX, § 19)—is empowered to punish as for contempt violation of the commission's orders by fines up to $500 per day during continuance of such violation. §§ 3498, 3499, C. O. S. 1921. *Planters' Cotton & Ginning Co.* v. *West Bros.*, 82 Okla. 145, 147; 198 Pac. 855. And § 8 declares that, 'in addition to any penalty' that may be imposed by the commission for contempt, one directly or indirectly 'violating the provisions of this act' shall be guilty of a misdemeanor and be punished by fine or imprisonment.

> And similarly the liability under § 9 is for 'violating the provisions of this act' and is 'in addition to any penalty' imposed by § 8. Both deal with an act already committed. Moreover, liability under § 9 is not limited to seizure and operation of the offender's wells but extends to the marketing of his oil. Absolute liability arises from a single transgression, and prosecution therefor may be had after all occasion for restraint of production has ceased. There is nothing in the Act by which the duration of the receivership may be determined. An owner whose wells are so seized may not, as of right, have production reduced or withheld to await a better demand, or have any voice as to quantities to be produced, or continue to have his oil transported by means of his own pipelines or other facilities, or have it sent to his own refinery or delivered in fulfillment of his contracts. Plainly such a taking deprives the owner of property without compensation even if the moneys received for oil sold less expenses are accounted for by the receiver. The suit is prosecuted by the State to redress a public wrong denounced as crime. The provisions of § 9 are not consistent with any purpose other than to inflict punishment for violation of the Act and they must be deemed as intended to impose additional penalties upon offenders having oil producing wells. *Boyd* v. *United States*, 116 U. S. 616, 634. *United States* v. *Reisinger*, 128 U. S. 398, 402. *Huntington* v. *Attrill*, 146 U. S. 657, 667, 668."

It is therefore submitted that the Secretary of Agriculture and the Commission have interpreted Section 6 (b) of the Grain Futures Act as authorizing—in slightly different form though alike in principle, a type of punitive proceeding such as was under consideration in the *Champlin* case and was held invalid. The Secretary and the Commission have chosen to interpret the section as authorizing the punishment of a past transgression by a suspension to continue a definite time in the future, in this case two years. It is respondent's contention that the infliction of this penalty may be lawfully accomplished, if at all, only through the medium of a judicial trial by court and jury.

It is interesting in this connection to compare the action of the Interstate Commerce Commission.

In *Lehigh Valley R. Co.* v. *Clark,* 207 Fed. 717, is contained a discussion of the development of the jurisdiction of that commission in respect of the allowance of reparations. As pointed out in that opinion, Section 14 of the original Interstate Commerce Act provided that the investigation made by the Commission might also include a recommendation as to what reparation, if any, should be made by the parties found to have been injured—damages by way of reparation under that act being comparable in principle to the infliction of the penalty of suspension upon the facts involved in this case. As the act was originally drawn, the enforcement of all Commission orders, including orders allowing reparation to injured parties, was to be by equitable proceedings in the federal courts. Congress had contemplated no distinction between reparation cases and other cases in which the order of the Commission was concerned only with future regulations. As the court says, at page 720:

> "It is one thing to enforce by injunction or mandatory process the lawful ministerial order of the Commission, as to things to be done or not to be done *in futuro* by defendant carriers in the conduct of their business, and quite another thing to enforce an order for the payment of damages by such carriers for a *past* violation of law." (Italics ours.)

And in the case of *Heck & Petree* v. *Railroad Co.* 1 Interstate Commerce Commission Reports 498, at page 777, the Commission recognized such a distinction by itself holding that a claim for damages "presents a case at common law in which the defendants are entitled to a jury trial" under the Seventh Amendment to the Constitution. Since the original statute provided for no trial by jury in suits in the federal courts to enforce Commission reparation awards, the Commission had repeatedly held that it could make no

award of damages for the reason that the defendants were entitled to have the amount of such damages determined by a jury. The consequence of this undoubtedly correct position taken by the Interstate Commerce Commission resulted in an amendment to the Interstate Commerce Act, whereby the distinction between reparation cases and those cases in which the Commission was regulating future action was recognized. Under the present act, proceedings to enforce reparation awards are before the federal district courts and are to be tried "in all respects like other civil suits for damages." The enforcement of other orders which are not of a nature requiring trial by jury is accomplished by proceedings in district courts which are equitable in nature.

Thus, we find one of the oldest administrative commissions known to the federal government promptly recognizing the proposition that administrative tribunals, as a general proposition, are concerned with rules of conduct for the future, while the determination of rights and duties with respect to past transactions and the consequences thereof is left to the process of the judicial trial.

By Article III, Section 2, Clause 3, of the Constitution, it is provided:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

In the Sixth Amendment to the Constitution, the requirement of a jury trial is repeated, and the additional conditions imposed that the trial of persons accused of crime shall be speedy and public, the jury an impartial one, selected from the state and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and that the accused shall be informed of the nature and cause of the accusation, be con-

fronted with the witnesses against him, have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense.

It is respondent's contention on this point that if the Commission's interpretation of the section were to be accepted, then the section would become invalid because a jury trial is not afforded. The error in the Commission's construction of Section 6 (b) will become manifest if we consider the provision in connection with Section 9 of the same act.

The Commission has taken the view that the act may be read—(as 6(a) reads)—as if it contained the bracketed words:

> "If the Secretary of Agriculture has reason to believe that any person [has violated] or is violating any of the provisions of this act or [has attempted] or is attempting to manipulate the market price of any grain in violation of the provisions of Section 5 hereof * * *."

Thus the Secretary claims the right to institute, and the Commission the right to entertain, proceedings based on alleged violations of ancient origin and to punish for such violations even though there is no allegation that the accused person is either then violating the act, or then attempting to manipulate the market price of any grain. This point is discussed in the light of that interpretation. The necessary implication from the Commission's holding is, of course, that the guilt or innocence of the accused person could lawfully be determined without trial by jury.

It will be noted that Section 9 of the same act declared certain violations to be misdemeanors punishable by a fine not exceeding $10,000, or imprisonment not exceeding a year, or both. *The latter section contemplates a conviction in a criminal proceeding in a district court.* If, therefore, *under the construction contended for,* the violation of cer-

tain of the provisions of the act is a crime under Section 9, how can the same conduct, whenever past offenses are involved, be any the less a crime under Section 6(b)? By declaring in one section, that a forbidden act is a crime, and by not doing so under another section, Congress could not make the same act at once a crime, and not a crime, within the Constitution. The consequence of the Commission's construction is, that for a past act denounced as a crime under Section 9, *which, under the Commission's interpretation, is also cognizable by the peculiar processes of Section 6 (b)*, the violator could be deprived of his right to trial by jury by the mere device of "trying" him under Section 6(b) instead of under Section 9. It is respectfully submitted that the right to trial by jury afforded by the Sixth Amendment is of too serious moment to be either granted or withheld according to the form of the proceedings or the character of the forum before which the proceeding pends. *United States* v. *Athens Armory*, 24 Fed. Cas. No. 14473.

In the case of *Boyd* v. *United States*, 116 U. S. 616, the proceeding was technically civil in form, seeking the forfeiture of goods under a statute which made the forfeiture of such goods part of the penalty for a violation of the statute. This court held that the action was in substance and effect a criminal proceeding and therefore within the constitutional prohibition against compelling any person to be a witness against himself in a criminal proceeding. This holding was followed and approved in *Lees* v. *United States*, 150 U. S. 476.

In the case of *Boyd* v. *United States*, 116 U. S. 616, it is said, at page 635:

> "Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. *It may be that it is the obnoxious thing in its mildest and*

least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.* We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law." (Italics ours.)

But, it may be suggested, since neither manipulation in fact, nor attempts to manipulate, have been labeled crimes by the provisions of Section 9, therefore the foregoing argument, while sound as to violations specifically treated by Section 9, is not applicable to actual manipulation or to attempts to manipulate. The answer to this argument is obvious. If because of the Commission's construction of Section 6 (b), the section must fall as unconstitutional because of the argument just made, then it must fall altogether, for the structure of the particular provision is such that it could not survive, part valid and part invalid.

Furthermore, the complaint in this case charged a conspiracy to violate the provisions of the Grain Futures Act and a conspiracy having as its objective the manipulation of the market price of grain, and therefore charges acts which are crimes within other statutes of the United States. (U. S. C. A., Title 18, sec. 88; U. S. C. A., Title 15, secs. 1, 2) In respect of the constitutional right to trial by jury, the effect and purpose of the Sixth Amendment cannot be ad-

roitly avoided by selecting an administrative tribunal, and its forms of practice for the statement of and the trial of the criminal charge. (*Boyd* v. *United States,* 116 U. S. 616; *United States* v. *Athens Armory,* 24 Fed. Cas. No. 14473.) The proceeding instituted by the Secretary is clearly one seeking the recovery or infliction of a penalty as a punishment for past offenses. It is not in aid of executive action, or in the nature of an injunction against, future violations. It is strictly and purely a proceeding brought in the public interest, in order to punish the accused. This court said, in the case of *Huntington* v. *Attrill,* 146 U. S. 657, at page 668:

> "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs.* The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries:* the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors.*' 3 Bl. Com. 2."

In the case of *United States* v. *Chouteau,* 102 U. S. 603, at page 611, the court said:

> "The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."

And in the case of *O'Sullivan* v. *Felix,* 233 U. S. 318, at page 324, the court said:

> "The term 'penalty' involves the idea of punishment for the infraction of the law, and is commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered."

Constitutional provisions designed to protect citizens against unjust prosecution may not be avoided by adopting an unusual method of punishment nor by the employment of an unusual method of measuring and providing for the punishment. It is submitted that it is the *nature, extent* and *effect,* and not the particular kind of prescribed punishment, which must determine the character of the offense. In the instant case, respondent was charged, not only with the violation of a public law, but was also accused of conspiring with others to violate a public law of the United States. Upon such allegations a penalty is sought to be imposed which will result in depriving respondent of his liberty of pursuit for the period of two years. The monetary loss to be thus inflicted might well amount to more than the fine of $10,000 provided for under Section 9 in respect of certain specific violations contemplated by that section.

In the case of *Lipke* v. *Lederer,* 259 U. S. 557, at page 562, this court said:

> "And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded."

It is respectfully submitted that Section 6 (b), as construed by the Commission and sought to be enforced by the particular proceeding contemplated herein, would be clearly unconstitutional in that such construction would deprive the petitioner of his right to trial by jury.

Whether this proceeding be regarded as a criminal proceeding, or a civil proceeding to recover a penalty, makes little difference, because if it is the latter, then the proceeding falls under the Seventh Amendment to the Constitution. In compliance with the mandatory requirements of

the Seventh Amendment for the preservation of a jury trial, the courts of the United States have held the following to be common-law actions: (1) Actions by the United States to condemn property for government purposes under the power of eminent domain: *Beatty* v. *United States,* 203 Fed. 620; (2) Actions for triple damage under the Sherman Act for injuries resulting from acts in violation of that act: *Meeker* v. *Lehigh Valley R. Co.* 162 Fed. 354; (3) Forfeiture proceedings pursuant to federal statutes, unless the forfeiture of property to be forfeited was made on navigable waters, and thus within the jurisdiction of the admiralty court, even though the forfeiture proceedings were begun by the customary libel: *United States* v. *Athens Armory,* 24 Fed. Cas. No. 14473; *The Sarah,* 21 U. S. 391; *United States* v. *130 Barrels of Whiskey,* 27 Fed. Cas. No. 15938; (4) Actions to enforce forfeitures in proceedings prosecuting fraud under the Internal Revenue laws: *Garnharts* v. *United States,* 83 U. S. 162; *Shawnee National Bank* v. *United States,* 249 Fed. 583.

DUE PROCESS.

If Section 6 (b) is to be interpreted as contended for by the Commission, then not only is it unconstitutional for the reasons above stated, but it is unconstitutional because the tribunal constituted by the act does not meet other requirements of due process of law. The section authorizes the Secretary of Agriculture, if and whenever he "has reason to believe that any person is violating any of the provisions" of the Act, to serve upon such person a complaint "requiring such person to show cause why an order should not be made directing that all contract markets, until further notice of the Commission, refuse all trading privileges thereon to such person." Thus, it is asserted by petitioners, the Secretary of Agriculture, for any reason that might occur to him, whether it be based upon evidence,

gossip or false rumor, for the purpose of punishment, may place upon the person proceeded against the burden of affirmatively establishing why an order should not be entered against him, which order, if entered, would deprive such person of his right to make contracts, and the right to employ others to make contracts in his behalf, respecting the future delivery of grain. Under the construction contended for by the petitioners, after the Secretary has filed such a complaint stating that he has reason to believe that the person proceeded against has been guilty of a violation of the statute, and has thus prejudged the question of the guilt of such person, and has transferred to the accused the burden and the responsibility of proving his innocence, the Secretary sits as a member of and chairman of the Commission. His appointed referee receives and records the testimony—his counsel prosecutes the action. Under these circumstances it is not unreasonable to assume that the Secretary of Agriculture comes to the hearing with somewhat of a closed mind. If the remaining two members of the Commission divide, the accused may expect nothing but a guilty verdict. We hasten to add that we wish nothing herein asserted to be construed as a criticism of the present Secretary of Agriculture, but the best of officials is not a substitute for law in a country of laws and not of men. This is not a case, as are the cases referred to in the Commission's opinion, where the Secretary, having previously issued a license or permit to some individual or corporation, determined by him as eligible for such license or permit *pursuant to the provisions of the basic legislation,* seeks to bring about the revocation of the permission theretofore granted by him. This is a case where the accused person, being at liberty to enter into transactions, and to employ others to enter into transactions for him, without procuring from any official, any permit or designation of any kind, finds his means of livelihood taken away from

him and a punishment inflicted upon him which might be more grievous than the specific punishment contemplated by other portions of the act.

Tumey v. *Ohio,* 273 U. S. 510, is cited for the proposition that this court has already held that a strong *official* interest (as well as some small pecuniary interest) in the outcome of a trial will disqualify an official from holding the trial. In that case a statute of the State of Ohio had provided that no person should possess any intoxicating liquors. The penalty of a fine and imprisonment was to be assessed against the guilty. The act further provided that any justice of the peace, mayor, municipal or police judge, probate or common pleas judge within the county might have jurisdiction to try the accused. Money arising from fines and forfeited bonds was to be paid, one-half into the state treasury and one-half into the treasury of the township, municipality or county where the prosecution was held, according to whether the officer hearing the case was a township, municipal or county officer. City and village councils were authorized by statute to engage detectives to ferret out violations.

In the *Tumey* case the Village of North College Hill had provided by ordinance that the mayor should receive the amount of his costs in each case, but none were to be paid unless the defendant was convicted. There was no way, therefore, by which the mayor could be paid for his services as a judge if those brought before him were not convicted, nor any way by which the compensation for detectives could be paid unless it was from a fund created from the fines imposed. This court, after considering the cases bearing upon the proposition that the amount of the emolument was remote and trifling, and therefore not of sufficient consequence to constitute lack of due process, held, *not only* that the prospect of emolument from the conviction of the defendant constituted lack of due process, *but also that the*

official interest which the mayor had in the outcome of the trial disqualified him from acting as judge. The court said, at page 534:

> "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him. * * *".

In the instant case, the Secretary of Agriculture has a strong official interest in the successful outcome of a complaint initiated over his signature—an interest so strong, we submit, that it would not be due process of law for the trial to continue before him, and therefore, to interpret a statute as authorizing such a type of proceeding would be to indulge an unconstitutional construction.

In proceedings brought before administrative tribunals the rules of procedure and the determination of the character and kind of evidence to be received, normally rest entirely with that administrative agency. If the construction contended for by the petitioners were to be upheld in the case at bar, no one can foresee or foretell the limits or extent of administrative power.

THE TERM "MANIPULATE" IS TOO VAGUE TO BECOME THE LAWFUL BASIS FOR A PENALTY.

The law has also declared that it is essential to the validity of penal statutes that such statutes define the interdicted offenses with particularity. This is so that the ordinary individual shall not be required to guess upon the question of whether his conduct is lawful or unlawful. Furthermore, the limits of the penalty for the offense must be definitely fixed by the Congress, since the power to do that cannot be delegated either to the Commission or to the courts.

In the case of *Connally v. General Construction Co.*, 269 U. S. 385, at page 391, this court said:

> "That the terms of a penal statute creating a new

> offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221; *Collins* v. *Kentucky*, 234 U. S. 634, 638."

This rule was applied in the case of *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, already cited in another connection in this argument.

As applied to the instant case, the phrase, "is attempting to manipulate the market price of grain," is subject to the same criticism.

The phrase is too vague and indefinite ever to become the proper foundation for a *penal* statute. Just when is a trader manipulating? Does it make any difference whether he is buying grain, and is a bull, or selling grain, and is a bear? How much grain does a trader have to purchase to be guilty of manipulation? How much does he have to sell in order to be guilty of manipulation? Does it make any difference whether he sells one day and buys the next day or maintains his market position for a few months, a few days, or a few hours? With respect to "attempts" to manipulate, the situation is aggravated. Is *any* attempt a violation, or must the attempt appear to have some probability of success? Is the test of the "attempt" the remote or possible effect—or is it that there must be a clear and present danger? What relationship may there be between the amount of the accused person's trades and the total quantity dealt in? These and other kindred questions spring to mind when the section is employed as stating the basis *for a penal statute*. This evil of indefiniteness and vagueness, while not wholly eliminated, is somewhat les-

sened when the act is used only as the basis for regulation, because if it is sought to be applied to an existing situation or to an existing practice, the trader has at least an opportunity to explain his transactions at the time, and thus to conform to that commission's ideas of what is right and wrong, at the very moment when the criticized conduct is brought to his attention. But certainly if officials are to be permitted to go back into transactions occurring three and four years ago, and charge that such transactions were all in an "attempt to manipulate" and seek to exact a penalty for those transactions, the act must be made specific and certain as to what manipulation or attempting to manipulate means.

We have already cited at page 40 of this argument authorities for the proposition that if a statute be susceptible of two possible constructions, by one of which it is constitutional and the other unconstitutional, that interpretation which will preserve the statute is to be preferred.

The interpretation of Section 6 (b) contended for by the respondent requires the holding *that this particular proceeding herein reviewed does not fall within either the text or the intent of the Grain Futures Act of 1922,* and that therefore the Commission was without jurisdiction to hear and determine the complaint based on the facts of this case. The construction of Section 6 (b) contended for by the Commission is clearly unconstitutional and would vitiate the section entirely. It would be contrary to the text of the statute and to the intent thereof.

If the legislature itself had undertaken to conduct the hearing herein conducted, and to pass an enactment excluding the respondent from the contract markets for the period of two years, such an act would have been a bill of pains and penalties falling within that clause of the Constitution prohibiting such enactments. *Cummings* v. *State of Missouri,* 71 U. S. 277. It is difficult to see how an agency of

Congress could do indirectly, that which the Congress could not do itself.

PETITIONERS' ARGUMENT ANSWERED.

To these contentions of the respondent the petitioners make one answer. It is their contention that the respondent, and all other persons trading on contract markets, are virtually, although not actually, licensed, and that the body of the law, which is usually applied where the revocation of permits and licenses is involved, applies in this case to the respondent and to everyone trading on contract markets.

The extension of the principles referred to, to cases of *unlicensed* individuals is not supported by a single authority, nor do petitioners point to a single sentence in the entire Grain Futures Act of 1922 to fortify the contention that the Congress either intended to license persons using such contract markets or engaging in business thereon, or that the constitutional rights of individual traders should be measured by the same yardstick which measures the rights of the licensed contract markets.

Under the Grain Futures Act as now constituted, there is a marked difference between that bundle of legal rights, constitutional and otherwise, which are possessed by the respective contract markets, and the bundle of legal rights possessed by those whose livelihood is the making of contracts for the future delivery of grain and the employment of others to do so for him. Congress has required that the boards of trade and the markets shall procure a license—it has not yet required licenses from individuals who desire to make contracts thereon. While a licensed market has what may be generally described as a sort of monopoly or franchise from the government, the unlicensed individual trader exercises his rights to invest and to make contracts for the future delivery of grain, in common with all citizens of the land.

This respondent, and any other individual who chooses to engage in the business of making contracts calling for the future delivery of grain, either as principal for his own account, or as an agent for others who desire so to do, may trade upon any contract market without formality of any kind and without prior application for the privilege to any specified government official or agency. The specific scheme of regulation contained in the Grain Futures Act of 1922 embraced the licensing and regulation of the *contract markets* only,—the places where trading in futures takes place, and not the licensing of individuals, brokers or commission houses.

REVOCATION OF THE LICENSE OF THE CONTRACT MARKET AFFECTS RESPONDENT'S CONVENIENCE—NOT HIS RIGHTS.

It is argued by the petitioners, that if the Commission, acting pursuant to Section 6 (a), should revoke the license of the Chicago Board of Trade, respondent and others similarly situated would be without a place wherein to trade, implying that therefore the respondent has only the same *rights* as the contract markets; that because *the contract market* may lose its designation as such without a trial by jury and by order of the authority which granted the designation, the same authority may also without trial by jury, inflict punitive penalties upon those who use the facilities of the contract markets. The argument is extremely far-fetched. If the Chicago Board of Trade, or any other designated market, suffers the revocation of its permit, that would not prevent the respondent and any others similarly situated from trading upon the Kansas City Board of Trade, or the Minneapolis Board of Trade. The individual's right to trade and make contracts in *any other* open contract market still remains; his *convenience* may be affected, but his right is unaltered. Furthermore, the source and the statement of the

respondent's legal rights are not to be found, as is the case of the contract market, within the permit or document executed by the Secretary of Agriculture and the law appertaining thereto under which he was authorized to issue it. *Until Congress* decides to regulate trading in grain futures by requiring individuals and commission men to procure a license before they shall be permitted to make contracts, either as principal or agent, the source of the respondent's right to trial by jury, to a hearing in the courts, and to a fair and impartial tribunal, is to be found in the Constitution and the cases decided thereunder. To say that because persons and individuals are permitted to do business on licensed contract markets, that thereby their rights are to be measured by the limits of that circle which circumscribes the rights of the contract market, is to ignore the circumstance that the Congress has not yet, either directly or impliedly, brought the rights of such persons under control by the licensing method. Whether the statute should be extended to require, that, before trading in grain futures, individuals should procure such a permit, is a profound and important question of *legislative policy*. The decision whether or not, in order to regulate trading in grain futures, individuals and participants in transactions shall be licensed requires the action of the legislative power. It is a matter to be left within and determined by the legislative power. It is submitted that the court cannot, by a process of construction, supply that which the Congress has not yet required.

VARIOUS ARGUMENTS CONSIDERED.

Board of Trade of the City of Chicago v. *Wallace, et al.* 67 Fed. (2d) 402, is cited by petitioners (p. 115) as authority for the proposition that, as Section 6 (b) is construed by the Secretary and the Commission, the proceeding against respondent is not a criminal proceeding. The

proceeding reviewed in the case of *Board of Trade of the City of Chicago* v. *Wallace* involved the question of whether or not the license issued by the Secretary of Agriculture to the contract market should be revoked because of the failure of said contract market to comply with other pertinent provisions of the Grain Futures Act. There, as the court properly held, the proceeding was for the revocation of a license or permit, and the court was concerned solely with the question of whether or not the Chicago Board of Trade had complied with the terms upon which its designation had been issued.

Petitioners, at page 108 of their argument, say: "Respondent contends that a person may not constitutionally be suspended on account of past actions." Respondent has made no such broad contention. Respondent contends that *unlicensed* persons cannot be barred from trading on account of past conduct under this statute, where it is apparent that there is no regulatory function being discharged.

An extract is cited (Br. p. 108) from the provisions of the Packers and Stockyards Act, wherein the Secretary of Agriculture is authorized to suspend a registration for a reasonable, specified period. The reference does not fortify petitioners' contentions in this case, but on the contrary indicates that under said act a specific provision is made for the licensing of commission merchants, dealers or brokers, as the case may be. It is significant that the original Packers and Stockyards Act of 1921, which contemplated the issuance of licenses, was considered by the same committee and the same Congress that enacted the Future Trading Act. Both acts were in a measure pioneer legislation, and in one, the Congress required licenses from commission merchants, and in the other it did not.

To support the contention that a jury trial is not required by law, petitioners cite the cases of—

Farmers Livestock Commission Co. v. *U. S.* 54 Fed. (2d) 375.

Hall v. *Geiger-Jones Co.* 242 U. S. 539.

Redmond & Co. v. *Michigan Securities Comm.* 222 Mich. 1, 192 N. W. 688.

People ex rel: Presmeyer v. *Commissioner of Police,* 59 N. Y. 92.

Voight v. *Board of Excise Commissioners,* 59 N. J. L. 358, 36 Atl. 686.

Cherry v. *The Commonwealth,* 78 Va. 375.

Lyman v. *Erie County Athletic Club,* 46 App. Div. 387, 61 N. Y. Supp. 884; Aff'd 163 N. Y. 552.

Premier Cereal and Beverage Co. v. *Pennsylvania Alcohol Permit Board,* 292 Pa. 127, 140 Atl. 858.

In re Smith, 10 Wend. (N. Y.) 449.

Munk v. *Frink,* 81 Nebr. 631, 116 N. W. 525.

State v. *Hanson,* 201 Iowa 579, 207 N. W. 769.

State Board of Medical Examiners v. *Macy,* 92 Wash. 614, 159 Pac. 801.

State v. *Armeno,* 29 R. I. 431, 72 Atl. 216.

Gregory v. *Hecke,* 73 Calif. App. 268, 238 Pac. 787.

Morley v. *Police Commissioner of Boston,* 261 Mass. 269, 159 N. E. 41; cert. den. 276 U. S. 625.

United States Industrial Alcohol Co. v. *Blair,* 6 F. (2d) 658, 660.

Caserta v. *Mills,* 28 F. (2d) 637, 638.

John Low v. *Commissioners of Pilotage,* R. M. Charlton Repts. (Ga. 1830) 302.

La Croix v. *County Commissioners,* 50 Conn. 321.

Since the Congress thus far has only undertaken to regulate trading in grain futures by regulating and licensing the markets or boards of trade where individuals make contracts—and has not thus far undertaken to regulate trading

in grain futures by drawing the individual traders within the scope of licensing provisions, it is submitted that the above cases are not applicable to this case. In all of the foregoing cases the courts were concerned with actions contemplating the revocation of specific permits which had been theretofore granted pursuant to some basic statute. This is all that is said by petitioners in respect of a jury trial. No answer is made to the proposition—raised by respondent in the court below—that, under Section 9 certain things are made misdemeanors, and that the Commission contends, even in respect of such matters so made crimes, it may inflict the penalty of suspension without a trial by jury.

In all of the wealth of adjudicated cases dealing with reviews of the actions of administrative tribunals and the place of such agencies in the American scheme of law, but one case appears to have upheld the theory that under a law an executive agency or department might inflict a penalty. That case, cited but not discussed by petitioners, is *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320. In that case a statute was upheld which authorized the Collector of Customs to impose a fine upon a steamship company for bringing in aliens afflicted with a loathsome disease and authorized the Collector of Customs to withhold clearance papers from the master of the vessel until the fine was paid. The decision is supportable upon a number of grounds, namely, that the amount of the fine involved is small, and the case arose in respect of the right to regulate foreign commerce, over which the Congress has an *absolute* power. Furthermore, the necessity for expedient action in such cases was a matter for consideration.

In respect to the proposition that petitioners' construction would not be consistent with due process of law because it would authorize the complainant to sit as a judge

in his own case, petitioners cite in reply the case of *Farmers' Livestock Commission Co.* v. *United States,* 54 Fed. (2d) 375. There again the court was concerned with a proceeding involving the revocation of a license as such, and not the infliction of a punitive penalty as such. It is, of course, well settled law, when dealing with the question of the revocation of licenses, that the administrative officer or agent which granted the license, or some other agency designated by the basic law, may conduct the hearing involving the propriety of its revocation. "The Lord giveth—The Lord taketh away." But that is not true of the liberty of contract to trade in grain futures. Before the activities of individuals desiring to engage in the business of making contracts for the future delivery of grain are to be brought within the functions of a license, the Congress must determine whether the activities of individuals, in the various cities and states of the United States, are of such moment, or whether they constitute in the main, such threat to the licensed contract markets and to interstate commerce, that such individuals should be required to submit themselves to the examination and scrutiny of licensing officials before permission to trade is granted or may be revoked. This phase of the question involves, first, a determination of legislative policy before the courts may be asked to pass upon the question.

In reply to respondent's contention that the phrase, "is attempting to manipulate the market price of grain," is too vague and indefinite to be the lawful basis for the imposition of a penalty, petitioners contend, *first,* that the order in this case does not depend for its validity upon the finding that the respondent attempted to manipulate the market price of grain, and *further* contend that the respondent's argument with respect to the definiteness of the standard is without merit; citing in support thereof the cases of *Bartlett-Frazier Co.* v. *Hyde,* 65 Fed. (2d) 350,

354; cert. den 290 U. S. 654, and *Board of Trade* v. *Olsen,* 262 U. S. 1, 39-40. The answer to petitioners' contention is, that they have failed to appreciate the difference between the use of the word "manipulation" when used as stating the basis for the necessity of regulation, and the use of the phrases, "manipulate" and "attempt to manipulate" *as the basis for the exaction of a penalty.* It is submitted that in the case of *Board of Trade* v. *Olsen,* 262 U. S. 1, the court was merely *recognizing* and describing a practice by its common term, and sustained the validity of the act as designed for the treatment of the prevention of that general problem, but that is quite apart from the use of either of the criticized phrases *as the basis for the infliction of a penalty.* In the case at bar, the accused is being deprived of his freedom of contract and his right to earn a livelihood, for having violated, according to the Commission, some vague and indefinite standard which will change, apparently, from one commission to another. In the case of the respondent, it is not even manipulation, for it was conceded very early in the case that the accused did not manipulate the market; in this case the order is based entirely upon a concept of "attempted manipulation" which is even less susceptible of exact definition. What conduct constitutes an attempt under the Grain Futures Act? Is *any* attempt a violation, or must the attempt appear to have some probability of success? Is the test the remote or possible effect—or is it that there must be some clear and present danger? Generally speaking, in the field of criminal law, to constitute an indictable attempt there must be at least an apparent ability to commit it, and if the means employed are so clearly ineffectual that it is obvious that the crime cannot be committed the attempt is not indictable. It is respectfully submitted that if Section 6 (b) is to be construed as authorizing the infliction of the penalty of suspension upon individual traders for having

attempted to manipulate three and four years prior to the proceedings, the act must first be made specific and certain as to what manipulation or attempted manipulation means, and furthermore, the limits of the penalty for the offense must be definitely fixed by the Congress. Until that is done the statute, as construed by the Commission, is unconstitutional.

In respect of the contention that the order in this case does not *depend* for its validity upon the finding that the respondent attempted to manipulate the market price of grain, respondent answers that it is upon the charge that the respondent attempted to manipulate the market during 1930 and 1931 that the Commission acted, and the order so finds (R. top of p. 464). The Commission did not see fit to base its order solely on the failure to file reports in 1930, or solely on the failure to file reports in 1931. These were merely the evidentiary facts on which it reached the conclusion of ultimate fact, namely, that the respondent had attempted to manipulate the market price of grain. Furthermore, as we have pointed out, it is the theory of the act, and has been the practice since the act was in effect, to require the governing board of the board of trade to bring about compliance with the reporting requirements or suffer the consequences of the loss of its designation as such.

III.

THE CONCLUSION THAT RESPONDENT ATTEMPTED TO MANIPULATE THE MARKET PRICE OF WHEAT DURING THE YEARS 1930 AND 1931 IS NOT SUPPORTED BY THE WEIGHT OF EVIDENCE.

In the consideration of the factual side of this proceeding the charge that the respondent "conspired and colluded with various persons and grain firms of the Board of Trade to conceal his trading and position in the market from the

Grain Futures Administration" (R. 11, par. 3) may be eliminated. It was vigorously and emphatically denied by the representatives of the grain houses who testified, was not supported by any evidence, and is not dealt with in the Commission findings.

Another inference from the averments of the complaint —not directly alleged—was that the respondent *actually manipulated* the market price of wheat downward during 1930 and 1931. Certain of the paragraphs of the complaint (R. 24-25) ingeniously grouped and set off price declines in wheat during 1930 and 1931, against the statement of certain transactions, thus inferring that respondent's transactions brought about the change.

However, at the beginning of the hearing, counsel for the secretary stated to the referee that the secretary did not charge Mr. Cutten with having actually manipulated the market—and the Commission's opinion holds (R. 464):

> "Respondent is not charged with having manipulated prices and the proof does not establish that he caused the decline of 78 cents per bushel in the price of wheat which occurred between January 2, 1930 and December 31, 1931."

Aside from the paucity of evidence in support of the inference, this finding was no doubt prompted by the fact, now of common knowledge, that no human agency was able to resist the decline in prices of all commodities that prevailed throughout the years of 1930 and 1931. It is pretty well established that the waves of liquidation that have engulfed the various commercial countries of the globe have been of a character to defy the resourcefulness of any one man or group of men. Nations have resisted national collapse in a spirit of desperation, yet the respondent, with forty years of market activity behind him, is found guilty of having disregarded these national and world-wide manifestations, and *having attempted* to artificially manipulate the price of wheat in the face of forces that have defied the

ingenuity of economists and statesmen. The Commission reached its conclusion of fact primarily from the finding that no reports were filed in 1930, and from the finding that incorrect and allegedly false reports were filed in 1931. These two circumstances represent the preliminary facts upon which the Commission rested its conclusion. It is this conclusion upon which the order of suspension is founded. It is not the failure to file reports, *per se,* that resulted in the order of suspension—nor is it, *per se,* the filing of false or incorrect reports. It is the conclusion that (R. 465) "respondent's purpose in concealing his position in the market was to manipulate the price of grain and thereby to make large profits." Since the provisions of Section 6 (b) are directed at manipulation, this conclusion was necessary in order to bring the holding with respect to the default, within the scope of that section. With the Commission's statement that during 1930 and 1931 the respondent entered into transactions for profit we will not differ—but that respondent attempted to manipulate the market price of wheat is a conclusion not supported by *any* evidence, much less by the *weight of evidence.*

First, with respect to the failure to file reports in 1930. In considering the respondent's activities during the two years singled out by the complaint, some regard must be had to the respondent's business background and history. It is alleged in his petition to the Circuit Court of Appeals (R. 3) that for forty years he has pursued the business and occupation of grain trader. There is ample evidence in the record from witnesses that his forty years of business endeavor have been free from any untoward accusations of any character. (R. 48, 114.) The business in which the respondent and the others who testified were engaged is peculiarly a business that depends upon the word of its participants for the faithful execution of orders and trans-

actions. Those who remain in it for long periods of years are men whose word has come to be regarded as reliable, and whose judgment and business acumen survive the test of the market place. Other agencies of society may differ with respect to the commercial usefulness of boards of trade and stock exchanges, but the fact remains that in so far as the particular activities of the participants are concerned, these are businesses wherein tremendous values pass from hand to hand on the strength of the spoken word. Such circumstances, while by *no means of controlling or conclusive importance,* do furnish some indication of the character of those who engage in the business.

Richard H. Uhlmann, of Uhlmann & Co., (one of the commission houses) testified (R. 51) that during 1921 he worked for Jackson Bros., another one of the grain commission houses of Chicago, and that Mr. Cutten had traded heavily at that time. This witness testified that in 1921 Mr. Cutten frequently traded in over 500,000 bushels; *he frequently* traded for others, and the witness further testified that he "knew of certain accounts for whom he traded, although they were numbered accounts." (R. 51.) *Mr. Cutten's system of trading during 1930 and 1931 was no different than it was in 1921.* He traded in his own account, said this witness, and probably directed a dozen accounts for others. These accounts were carried by grain houses under symbols and numerals in 1921, just as they were in 1930 and in 1931. There was therefore nothing novel about Mr. Cutten's method of doing business, *nor was there anything unusual in 1930 and 1931 with respect to his having a number of accounts.* The Grain Futures Administration itself has recognized the necessity of secrecy with respect to the activities of traders by assigning code numbers to them and having them report thereunder.

Reference has been made in the Commission's opinion and finding and reiterated in the statement of the case

to the effect that respondent "split his trade into thirty-five accounts." (R. 464, Finding No. 5.) The fact is apparent from all the testimony in the record that these accounts were not "split" during 1930 and 1931 for any purpose peculiar to those years. *These accounts were accounts which had been maintained for a number of years with all of the commission firms involved.*

Some of these accounts were admittedly those of Mr. Cutten.

Others were those for Mrs. Cutten.

Still others were those for his brother.

Some of the accounts were in the names of friends. Some of these accounts he guaranteed.

Some of respondent's accounts were guaranteed by his brother.

The reporting requirements first went into effect early *in 1926.*

On February 6, 1926, Mr. L. A. Fitz, then and now in charge of the Chicago office of the Grain Futures dministration, sent Mr. Cutten a letter requesting him to make reports (R. 130).

During 1926 and 1927, reports were duly received from Mr. Cutten's office without criticism. (R. 131.)

In 1927, the reporting requirements were suspended, and the Chicago office of the Grain Futures Administration duly advised Mr. Cutten, in writing, of that fact (R. 133).

In November of 1927, the reporting requirements were reinstated, and again the Chicago office of the Grain Futures Administration duly advised Mr. Cutten of that fact (R. 133). Mr. Fitz admitted on cross-examination (R. 141):

> "I am taking the position that Mr. Cutten did not comply. *Never have I made a request of them and in turn had from them a refusal to comply.*"

In October of 1932, the reporting requirements were again suspended, and remained suspended until July of 1933, and again Mr. Cutten was duly advised (R. 178). Mr. Fitz, in testifying with respect to the 1932 suspension order, said (R. 178):

> "This is a notice to Mr. Cutten that the reporting requirements affecting his holdings were suspended. This constitutes a suspension order. This did not go to all board members. I say that for the reason that in the membership of the Board of Trade there are officials of banks and members of railroads and others, *but it went to everybody that was active in the grain business, that we had been in contact with and who had been reporting to us.*" (Italics ours.)

It will be noted, therefore, that the Chicago office of the Grain Futures Administration had itself established the *practice* of notifying those reporting to it of changes in the reporting requirements. It notified respondent when the regulations went into effect—it notified him when they were suspended. (R. 178.) On prior occasions, it had notified him when reports were not coming in promptly, but the entire year of 1930 passed and no complaint was made by the Supervisor for the Grain Futures Administration in Chicago, to Mr. Cutten. Nor was this mere oversight. Mr. Cutten traded in the market throughout 1930. The Chicago office of the Grain Futures Administration knew of this activity (R. 149, 170.) During the month of February, 1930, reports evidencing Mr. Cutten's activities were made to the Chicago office of the Grain Futures Administration by Clement, Curtis & Co. and by James Kidston & Co. (R. 149, 150, 151.) These reports show numerous days that have accounts in excess of 500,000 bushels (R. 149) and some of 1,000,000 bushels (R. 170). The Chicago Supervisor admitted on cross-examination (R. 149) that he was put on notice that Mr. Cutten had failed to comply with the reporting requirements.

This situation prevailed during the months of March, April, May, June, July and August of 1930. (R. 170.)

At this point we desire to correct a statement made on page 50 of Petitioners' Brief. It is there said:

> "Not only did respondent himself fail to report his transactions and net open position when they were of sufficient volume to bring him within the reporting requirement, but the firms with which he carried accounts also failed to make reports of his transactions although required to do so by the lawful regulations."

This is an incorrect and misleading statement for the fact is, as will appear from the record (R. 149), the various grain firms did report, but, in accordance with the common understanding among such houses (which we shall have occasion hereinafter to discuss and justify), did not, during these years combine the accounts and report such accounts as a unit. The commission houses did report holdings of the respondent in excess of one million bushels at times when no reports were being received from respondent. (R. 170.)

It is submitted that in 1930 the Grain Futures Administration was fully informed of the reporting delinquencies which, it is now contended, required more than two years to discover. (R. 170.)

Mr. Fitz testified (R. 153):

> "I feel quite sure that we discussed the situation as a whole during the year 1930, and it is quite true that undoubtedly we did discuss whether or not we were getting an individual report from Mr. Cutten. The discussions are nearly always had with Dr. Duvel; because he is the Chief. We did not, during 1930, prior to the last day of April, 1930, discuss the alleged violations of Mr. Cutten in connection with these accounts on which these grain houses had reported from a violation standpoint. I believe that I had told Dr. Duvel, during this time, in reply to his discussion of the market situation, that we were not at this particular time getting a report from Mr. Cutten."

On another occasion he testified (R. 173):

> "In 1930 I had enough information, regarding these Cutten accounts, to cause me to say that they constituted a serious infraction of the law, in violation of the regulation issued under the law, I account for the fact that a serious infraction of the law, known to me and known to my chiefs in Washington, was permitted to go unpunished from 1930 until 1934 because we didn't know of the seriousness of the infraction in 1930."

If, as the Commission holds, respondent was then attempting to manipulate the market, and was attempting to conceal his position in the market by the failure to file reports, then he effectively created a circumstance that should have led to prompt inquiry.

The statement that the exchange of telegrams between Secretary of Agriculture Hyde and respondent during February of 1930 "shows that respondent was deliberately concealing his market transactions" (Pet. Br. p. 34), is vigorously denied.

To understand respondent's telegram, it must be appreciated that traders omit the last three ciphers in speaking of quantities. The telegram, therefore, advised that respondent's activity for the two weeks preceding, consisted of selling about 400,000 bushels in privileges, each way, and that during that time he had not sold wheat except to protect trades put to him as the result of transactions in privileges. The net effect of trading in *all accounts* in the May 1930 future between the dates of February 13, 1930 and February 25, 1930, both inclusive, was to increase respondent's short position by only 100,000 bushels; the net effect of respondent's trading in the July future for the same period, was to buy 495,000 bushels more than were sold. (R. 401.) Activity of such character for one of respondent's known reputation is of absolutely no importance in a grain market. The aggregate *short position* of which petitioners speak (p. 35) is, of course, the result of *all* transactions

from the first of that year, and in *all accounts*. Petitioners do not refer to the combined holdings in August of 1930 in the December future when all the accounts were *long*, approximately four million bushels of wheat. (R. 405.)

Finally, when the figures which have been prepared by the statisticians for the Secretary of Agriculture are examined, it becomes readily apparent how strained the charge of "attempted" manipulation appears. There was offered in evidence at the hearing, and is printed at pages 400 to 419 of the transcript of record, an exhibit called "Complainant's Exhibit 411." This exhibit was prepared by accountants for the Secretary by taking the records of Mr. Cutten's accounts, Mrs. Cutten's accounts, R. J. Cutten's accounts—*all accounts* with *all houses*, and assimilating them into one huge chart. It deals with the condition of the combined accounts for each day during the years 1930 and 1931. It will be recalled that Mr. Fitz testified that a "dangerous position" (which is one normally spurring his official activity) was five million bushels *in any one future* (R. 170), not all futures combined. Assuming for the moment, the validity of the test, it may be applied here for the purpose of determining whether or not during this period of 1930 these accounts ever reached a point which, it may be assumed, respondent was attempting to conceal, or, a point which would have any vital influence on the market price of grain. Referring to Complainant's Exhibit 411, and in particular to page 404 of the transcript of record, it will be noted that the total holdings—in all accounts—and in all futures—reached its maximum in 1930, on June 25, 1930. On this date the total holding in *all futures* in *all accounts* was 7,725,000 bushels. This is split into three futures, 400,000 bushels in the July option, 3,675,000 bushels in the September option, and 3,650,000 bushels in the December option. The record discloses that this position was maintained for a very short time, and

from this date in June until the close of the year 1930, the volume of the transactions and the total holdings were very much less. Therefore, this exhibit discloses that at no time during the year 1930 did the total holdings in *all the accounts, in any one future,* ever reach that point which Mr. Fitz has characterized as a dangerous position. We respectfully submit, therefore, that there was no motive for concealment, because, treating *all the accounts on a combined basis,* the respondent had nothing to conceal.

There is still another circumstance which must be considered in connection with the Commission's conclusion that respondent attempted to manipulate the market price of grain during this period. When, in 1930, the price of wheat began to recede, there was created under the sponsorship of the United States a corporation known as the Grain Stabilization Corporation. Its purpose was, as its name implies, a quasi-governmental agency to stabilize the price of wheat. The detailed activities of this corporation were not available in public form, at the hearing, but Secretary of the Treasury Morgenthau, in 1933, did make known some statistics with reference to the activities of this corporation. According to a public pronouncement made in 1933 (R. 177), the total purchases of the Grain Stabilization Corporation, beginning in May 1930 and continuing to March 3, 1933, amounted to 370,278,449 bushels of cash wheat, and 538,337,000 bushels of wheat futures, or a total of 908,615,449 bushels. The corporation's peak holdings of cash wheat was reached on June 30, 1931, on which date the corporation held 257,136,571 bushels of cash wheat, no futures being held on that date. It is fair to assume, therefore, that throughout the year 1930 the activities of this Grain Stabilization Corporation were of such magnitude and character that respondent's relatively minor activities could have had no effect upon the market. We respectfully submit, therefore, that so far as the year 1930 is concerned,

there is no evidence in the record tending to support the charge that respondent attempted to manipulate the market price of grain, and the conclusion does not logically follow merely from the fact that no reports were filed during that period.

No communication of any kind was received by Mr. Cutten's office from the Chicago office of the Grain Futures Administration between the dates of November 4, 1927 and January 6, 1931.

On January 6, 1931, the Grain Exchange Supervisor at Chicago, sent a letter to Mr. Cutten calling upon respondent to report his Chicago grain futures transactions beginning as of the close of business January 5, 1931 (R. 444). This was a routine letter for it advised Mr. Cutten of his reporting number, and indicated that blanks for rendering reports, as well as a set of instructions and a dummy report sheet to illustrate the manner in which reports were to be made out, were enclosed. *This was the first communication in over three years.* An immediate response was forthcoming, for there appears in evidence (R. 134 and 444) an exhibit showing that the Chicago office of the Grain Futures Administration received, under date of January 7, 1931, a report showing a transaction and open interest in July wheat. The Chicago office of the Grain Futures Administration called attention to the error by a letter, which went on to say: "Apparently you have misunderstood the meaning of this call for report and have simply reported on the one grain and future in which you made a transaction on January 7th. This call was made for complete report upon your Chicago grain futures transactions and at that time our records show that you had open interests in other grain than the July wheat.*

*Significant as negativing petitioners' contention that respondent could conceal his position from the Grain Futures Administration. It knew instantly from its records (reports from brokerage house with which Mr. Cutten dealt) that respondent had a position in July wheat different from that indicated in the report of a single day's transactions.

Will you kindly send a corrected report for January 7th and keep in mind the requirement regarding additional reports." The consequence was, that during the year 1931 reports were made by Mr. Cutten's office from time to time. These reports were made out by a young lady in Mr. Cutten's office who had succeeded the gentleman who had made out the reports for earlier years (R. 154, 166, 167). The Commission's complaint with respect to such reports as were filed during 1931 is that they were deliberately false because *all* of the accounts were not combined and reported as a unit.

As a matter of fact, this method of reporting was in accordance with the then prevailing impression among the grain commission houses in Chicago, namely, that the regulations did not require that the accounts be *combined and reported,* but merely that whenever a particular account reached 500,000 bushels that particular account was to be reported. If we refer to the testimony of Mr. Arthur F. Lindley, of the firm of Clement, Curtis & Co. (R. 111), it will be seen that he said:

> "In 1930 and 1931 our firm reported on all accounts in our office of this group that have been introduced in evidence, *the Cutten accounts, where an individual account exceeded 500,000 bushels in any one future in any one grain. We did not report as a combined group. These accounts were not probably considered by us as under the ownership of one person. I looked to the account of Maude Cutten as her individual property.* It is not uncommon in the custom and practice of our business, that a man may guarantee an account, may furnish the margin for that account, and at the same time give the orders for the transactions in that account, and still the property interest, the ownership of that account be in a third person, or be in another person. To illustrate: If, prior to July of last year, I were to open an account in the name of my wife, and if I furnished the margin and guaranteed the account and handled the trades in that account, our firm would consider that to be an individual account of my wife

and in no way coupled with my account, if I had an account. I doubt if we would treat it that way now [1934]. We have since been put on notice that a control account—and I have not yet found out what that word 'control account' means from a legal standpoint—but I think since the summer of last year we would probably inquire whether the account should not be reported because controlled by another individual, if that other individual also had another interest. I think the regulation was made prior to 1933, but they came to my attention in 1933."

An examination of the "General Rules and Regulations for carrying out the provisions of The Grain Futures Act of September 21, 1922 with respect to contract markets" (R. 433-439) would indicate that there was considerable justification for the confusion in the minds of the representatives of the grain firms. Most, if not all, of the grain firms with which Mr. Cutten carried accounts were so-called clearing members, that is to say, they belonged to the Chicago Board of Trade Clearing Corporation. The original Rules and Regulations issued under date of June 22, 1923, provided that there should be a report by or for each clearing member which should include all contracts of sale of grain for future delivery made on or subject to the rules of the contract market to which such clearing member was a party either by way of seller or buyer. Such report was to show (1) the net position at the beginning of the period covered by the report, (2) the quantity of grain purchased and the quantity of grain sold, (3) the quantity of grain delivered and the quantity of grain received on contracts during the period covered by the report, (4) the net position at the end of the period covered by the report and (5) the aggregate of all long and the aggregate of all short accounts at the end of the period covered by the report by the clearing member for whom the report is made.

The regulations then went on to provide (R. 435, subparagraph (f)) that the report should show: "the net

position at the end of the period covered by the report *of each* **separate account** *carried by such clearing member when such net position equals or exceeds such amount as shall be specified in a written notice from time to time by the Grain Futures Administration to such contract market.''* It will be noted, therefore, that in these original regulations promulgated under date of June 22, 1923, the emphasis was *on each separate account.*

The new regulations contemplating reports from *individual members* were promulgated under date of January 20, 1926. (R. 437-438.) As of that date there was inserted at the end of Subdivision (f) of Section 2 of the original Rules and Regulations the provisions whereby both members of contract markets and nonmembers were required to report, *but no subsequent amendment of any kind has clarified the words ''each separate account'' appearing in the original Subdivision (f) as set forth on page 435 of the record.* Therefore there would seem to be justifiable confusion in the minds of the representatives of the grain houses as to whether or not they should or should not combine accounts and then report the accounts on a combined basis.

Virtually all of the witnesses testified that auditors and representatives of the Chicago office of the Grain Futures Administration went through the books of the firms during the year 1930 and 1931, looked into these accounts (R. 59, 75, 87, 98, 106) and that at no time were any suggestions or changes made with respect to the method of reporting them.

With respect to the Regulations as amended, and their applicability to the respondent's situation, no definition of the word ''control'' is given in the Regulations, and the Chicago supervisor admitted on cross-examination (R. 173) that there might be a reasonable difference in opinion among individuals with respect to whether or not certain

types of accounts were within the meaning of the word "control." The right of the secretary to combine *all of the accounts* and unjustifiably enlarge the figures, is disputed because no definition is given by the regulations to the word "control." Does the word mean control of the trading judgment to be exercised in respect of purchases and sales, or does it mean control of profits or losses, as the case may be?

Reference is made in the opinion of the Commission (R. 463) to the fact that the accounts frequently reflected holdings in the amount of 490,000 or 495,000 bushels. This amount is no more indicative of concealment than holdings of 200,000 or 250,000 bushels, which are much more frequent. The figures themselves merely reflect the widespread view that reporting requirements were founded on an *individual account* basis.

A vast array of figures combining *all accounts and all futures* was prepared by accountants from the Grain Futures Administration but notwithstanding all the data at its command the Administration did not offer any testimony showing *the total volume* of trading in the market *on the respective dates* on which the respondent was active, in order that a fair comparison could be made; nor did the Administration offer any testimony disclosing or tending to disclose the total volume of wheat marketed during the criticized period. One cannot tell, therefore, whether or not this so-called "attempt" to manipulate constituted any real or present threat. It is only fair to assume in the light of what has been said with respect to the activities of the Grain Stabilization Corporation, and in the absence of any figures tending to show the total number of bushels traded in on each trading day, that the activities of the respondent were merely routine and had absolutely no effect upon the market price of wheat.

The Chicago office of the Grain Futures Administration waived the necessity of filing corrected reports back of the date of November 30, 1931, by a letter written to respondent on March 15, 1932. (R. 445.) The letter reads:

UNITED STATES DEPARTMENT OF AGRICULTURE

Grain Futures Administration,
Chicago, Illinois.

Field Office: MARCH 15, 1932.
Room 906, 332 So. LaSalle St.
Mr. A. W. Cutten,
231 South La Salle Street,
Chicago, Illinois.

DEAR SIR:

It has come to our knowledge that you have failed to comply with our reporting requirements as provided in the regulations issued by the Secretary of Agriculture which read as follows:

"Whenever any member carries or has under his control more than one account with any clearing member of a contract market, and the total volume of such accounts is equal to or in excess of the amount fixed in accordance with subdivision (f) of section 2 of these rules and regulations, then the total long and the total short position of all such accounts shall be reported and the names of all persons interested in such accounts shall be furnished to the supervisor in charge.

"Whenever a member has under his control an amount of wheat, corn, oats, barley, rye, flax, or sorghum equaling or exceeding the amount fixed in accordance with subdivision (f) of section 2 of these rules and regulations, and files for execution an order for the purchase or sale of any grain future, such individual shall report that day to the Grain Futures Administration his total long and/or total short positions in the several futures in that grain in the market.

"Each contract market shall make, or cause to be made, by its nonclearing members reports showing all or such part of the facts required to be shown by or for clearing members as the Grain Futures Administration shall from time to time specify."

Your attention was directed to this matter by our letters of January 6, 1931 and January 15, 1931. Ex-

amination of records disclosed the fact that there have been many days during the past year when your reports were due but were not made in accordance with the regulations.

You are hereby called upon to render reports in compliance with the regulations quoted herein beginning, *for the present, with the close of business November 30, 1931.* Be sure to include in such reports each and every account in which you have an interest in the open contracts or over which you exercise *any direction* or control. Kindly see to it that these back reports reach us promptly and that current reports come forward each day they are due.

Very truly yours,

(Signed) L. A. FITZ,
Grain Exchange Supervisor.

LAF:LE

(Italics ours.)

We respectfully direct the court's attention to the words "for the present" in the next to the last paragraph of the letter. The words "any direction" were used for the first time, in any regulation. At that time, although apparently in full possession of the facts, the Chicago office did not ask the respondent to make corrected reports back of the date of November 30, 1931. These reports were duly filed. (R. 167.)

Petitioners have referred to the fact that an "investigation" lasting from November of 1931 to April, 1934, was required to "uncover" respondent's transactions. When respondent was asked to file reports beginning with the date of November 30, 1931, he responded. There is no evidence in this record that the respondent was ever requested by petitioners to supply the information which it is now asserted it took them three years to obtain.

Finally, the charge of "attempted" manipulation, relied upon by the Commission as the basis for its expulsion order, is completely exploded when some analysis is made of some particular price movements of grain in relation to specific transactions of the petitioner. For instance, in paragraph

45 of the complaint (R. 24) there is contained an allegation that the respondent was long wheat on April 10, 1930, in the amount of 1,800,000 bushels. (This is in all accounts and in all futures.) Between April 10, 1930 and April 26, 1930, it is alleged that the respondent sold wheat futures aggregating 3,210,000 bushels, thus reversing the long position and attaining a short position of 1,410,000 bushels. On April 10, 1930, the beginning of the alleged period, the closing price of May wheat future on the Board of Trade was $1.14\frac{1}{8}$ and on April 26, 1930, the closing price of the particular future was $1.02\frac{1}{8}$—a decline of 12 cents per bushel. Although the allegation is not stated, we assume that this particular paragraph was put into the complaint in order to give the impression that the respondent's transactions were inimical to the public weal, and although not stated, the inference is that there is some relationship between respondent's transactions and the decline in the price of wheat. If reference is made to Exhibit 411, with particular reference to page 402 of the transcript of the record, we note that during the criticized period Mr. Cutten's activities in May 1930 options were virtually none. He did have transactions (treating all accounts combined), in the July 1930 future. On April 16, 1930, the *combined accounts* sold 1,500,000 bushels of the July option. According to page 72 of Statistical Bulletin No. 41 of the United States Department of Agriculture (which is a voluminous document not printed in the transcript of record but which, under the stipulation of the parties may be referred to for purposes of argument) the market price of the 1930 July future jumped $2\frac{1}{4}$ cents on April 16, 1930. On April 19, 1930, according to Complainant's Exhibit 411 (R. 403), the combined accounts *bought* 1,090,000 bushels of the 1930 July future, and on that date the price *declined* $1\frac{3}{4}$ cents. On April 23, 1930, the combined accounts *sold* 500,000 bushels of 1930 July wheat future, and on that date the price went

up 1⅝ cents, so that so far as the respondent's particular activities are concerned there seemed to be absolutely no relationship between his particular activities and the market price of grain.

Paragraph 47 of the complaint (R. 28) charged that on November 12, 1931, respondent was *long* 2,845,000 bushels in wheat futures. The complaint alleged that between the dates of November 12 and November 27, 1931, the accounts sold wheat futures aggregating 6,805,000 bushels, thus reversing the long position and attaining a short position of 3,960,000 bushels. On November 12, 1931, the price of the December future was 61¼ cents. On November 27, 1931, the closing price of the future was 52⅝ cents—a decline of approximately 8 cents per bushel, and of course the inference from the paragraph and with respect to which some testimony was offered (R. 254), is that this "coincidence" as it was called by the Secretary's counsel, was brought about by Mr. Cutten's activities, and the inference sought to be conveyed is that this decline in the price of 8 cents during the period set forth was Mr. Cutten's responsibility. By reference to page 418 of the transcript it will be seen, treating the accounts on a combined basis, that Mr. Cutten's first sales of May 1932 wheat took place on November 13, 1931, and another substantial sale was made on November 14, 1931. We have examined page 66 of Statistical Bulletin No. 41 issued by the United States Department of Agriculture, Table No. 28, and we find that the price of the 1932 May future declined 3 cents on November 10th and 2⅜ cents on November 12th, so that on November 13th when Mr. Cutten started to sell and to change his long position to a short position the price had *already* declined 5⅜ cents! Obviously, if Mr. Cutten was long 1932 May wheat on November 12, 1931, that would indicate that he was holding that wheat for a future rise in the price thereof. Manifestly his sales during the period from November 13, 1931 to November 27, 1931, were

merely sales in which he was trying to protect himself against loss. The fact of the matter is that Mr. Cutten's activities during the period had absolutely nothing to do with the market price of the grain.

It is respectfully submitted that the weight of the evidence does not sustain the finding that the respondent attempted to manipulate the market price of grain.

CONCLUSION.

The respondent respectfully submits that the complaint in the case at bar was not initiated in accordance with either the letter or the intent of the Grain Futures Act of 1922, that the Commission did not have jurisdiction to hear and determine the allegations thereof, and that therefore the judgment of the Circuit Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

FRANCIS X BUSCH,
ORVILLE J. TAYLOR,
JAMES J. MAGNER,
Attorneys for Respondent.

Chicago, Illinois.
April, 1936.